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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 437

COLORADO-UTE ELECTRIC ASSOCIATION, INC., a cooperative association,

Appellant,

vs.

THE WESTERN COLORADO POWER COMPANY, a Colorado Corporation, PUBLIC SERVICE COMPANY OF COLORADO, a Colorado Corporation, and THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, HENRY E. ZARLENGO, RALPH C. HORTON, and HOWARD S. BJELLAND, the individual members of said Commission,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

JURISDICTIONAL STATEMENT

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INDEX
and
TABLE OF CITATIONS

	PAGE
Introductory Paragraph	1
Opinion Below	2
Jurisdiction	3
Constitutional and Statutory Provisions Involved	4
Questions Presented	4
Statement of the Case:	
Preliminary Statement	5
Background	6
Colorado-Ute Application	7
PUC Decision	8
District Court Decision	9
Supreme Court Proceedings and Decision, including how Federal Questions were raised and Dissenting Opinion	10
The Questions are Substantial	12
Certificate of Service	24
APPENDICES:	
A—PUC Decision	26
B—District Court Judgment	99
C—Colorado Supreme Court Opinion	104

PAGE

D—Colorado Supreme Court Addendum 149

E—Constitutional and Statutory Provisions Involved 156

CASES:

Application of Baker Sales Barn, Inc.,
140 Mont. 1, 367 P.2d 775 (1962) 18

Dahnke-Walker Milling Co. v. Bondurant,
257 U.S. 282, 66 L.Ed. 239, 42 S. Ct. 106 (1921)..... 3

Frost v. Railroad Commission of California,
271 U.S. 583, 70 L.Ed. 1101, 46 S. Ct. 605 (1946).....3, 21

Louisville Gas & E. Co. v. Coleman,
277 U.S. 32, 72 L.Ed. 770, 48 S. Ct. 423 (1928)..... 3

Mayflower Farms v. Ten Eyck,
297 U.S. 266, 80 L.Ed. 675, 56 S. Ct. 457 (1936)..... 17

Michigan Public Utilities Commission v. Duke,
266 U.S. 570, 69 L.Ed. 445, 45 S. Ct. 191 (1925)..... 21

Morey v. Doud, 354 U.S. 457,
1 L.Ed. 2d 1485, 77 S. Ct. 1344 (1957).....15, 16, 17

New State Ice Co. v. Liebmann,
285 U.S. 262, 76 L.Ed. 747, 52 S. Ct. 371 (1932)..... 16

Northern Pacific R.R. Co. v. Minnesota ex rel Duluth,
208 U.S. 583, 52 L.Ed. 630, 28 S. Ct. 341 (1908).....3, 22

Pirie v. PUC,
72 Colo. 65, 209 P. 640 (1922) 18

Producers Transportation Co. v. Railroad Commission,
251 U.S. 228, 64 L.Ed. 239, 40 S. Ct. 131 (1920)..... 21

PUC v. Loveland,
87 Colo. 556, 289 P. 1090 (1930) 18

Smith v. Cahoon,
283 U.S. 553, 75 L.Ed. 1264, 51 S. Ct. 582 (1931).....3, 21

PAGE

Stephenson v. Binford,
287 U.S. 251, 77 L.Ed. 288, 53 S. Ct. 181 (1932) 21

Terrace v. Thompson,
263 U.S. 197, 68 L.Ed. 255, 44 S. Ct. 15 (1923) 17

Tinsley v. Anderson,
171 U.S. 101, 43 L.Ed. 91, 18 S. Ct. 805 (1898) 18

Truax v. Corrigan,
257 U.S. 312, 66 L.Ed. 254, 42 S. Ct. 124 (1921) 15

Washington ex rel. Seattle Title Trust Co. v. Roberge,
278 U.S. 116, 73 L.Ed. 210, 49 S. Ct. 50 (1928) 17

Williams v. Standard Oil,
278 U.S. 235, 73 L.Ed. 287, 49 S. Ct. 115 (1929) 21

Wolff Packing Co. v. Court of Industrial Relations,
262 U.S. 522, 67 L.Ed. 1103, 43 S. Ct. 630 (1923) 21

UNITED STATES CONSTITUTION:

5th Amendment 4, 11, 14, 17, 19, 20, 23

14th Amendment 4, 10, 11, 14, 15, 17, 19, 20, 23

Article 1, Section 10(1) 4, 11, 20, 22, 23

COLORADO CONSTITUTION:

Article XXV (25) 18

COLORADO STATUTES:

1963 C.R.S. 115-1-1 et. seq. 3, 4, 14, 20

1963 C.R.S. 115-1-3 ..... 4, 8, 15, 19, 20

1963 C.R.S. 115-1-4(2) 8

1963 C.R.S. 115-5-1 8

1963 C.R.S. 115-6-15 18

1963 C.R.S. 115-6-16(1) 18

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THE WESTERN COLORADO POWER COMPANY, a Colorado Corporation, PUBLIC SERVICE COMPANY OF COLORADO, a Colorado Corporation, and THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, HENRY E. ZARLENGO, RALPH C. HORTON, and HOWARD S. BJELLAND, the individual members of said Commission,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

JURISDICTIONAL STATEMENT

Introductory Paragraph

Appellant appeals from the judgment and order of the Supreme Court of the State of Colorado made and entered March 14, 1966, and the judgment and opinion underlying such order made and entered February 14, 1966, directing the District Court of Montrose County, Colorado, to order the Public Utilities Commission of the State of Colorado to vacate and set aside its decision granting to Appellant a certificate of public convenience

and necessity authorizing it to construct near Hayden, Colorado, a steam electric generating plant and associated transmission lines and related facilities, and authorizing it to execute notes payable to the United States of America in an amount not to exceed $22,876,000 and mortgages to secure the notes in order to finance the project.

This Statement is respectfully submitted to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

Opinion Below

The opinion and judgment of the Supreme Court of the State of Colorado, dated February 14, 1966, is reported at 411 P.2d 785, and appears herein as Appendix C.

The addendum of the Supreme Court of the State of Colorado, dated March 14, 1966, and made in denying Appellant's Petition for Rehearing, is reported at 411 P. 2d 805, and appears herein as Appendix D.

The opinion of the District Court of the County of Montrose, State of Colorado, dated December 5, 1963, has not been reported and appears herein as Appendix B.

The decision of the Public Utilities Commission of the State of Colorado, being Decision No. 60156, dated February 21, 1963, is reported in 48 P.U.R. 3d 113, and appears herein as Appendix A.

Jurisdiction

The opinion and judgment of the Supreme Court of Colorado was dated and entered February 14, 1966, and rehearing was denied March 14, 1966. Notice of Appeal was filed in that Court on June 9, 1966. The purpose of this appeal is to reverse and set aside the judgment of the Supreme Court of Colorado, which judgment upheld the validity of The Public Utilities Law of the State of Colorado, 1963 Colorado Revised Statutes (CRS) 115-1-1 et seq. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(2). The following cases sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Northern Pacific R. R. Co. v. Minnesota ex rel Duluth, 208 U.S. 583, 52 L. Ed. 630, 28 S. Ct. 341 (1908)

Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 66 L. Ed. 239, 42 S. Ct. 106 (1921)

Louisville Gas & E. Co. v. Coleman, 277 U.S. 32, 72 L. Ed. 770, 48 S. Ct. 423 (1928)

Smith v. Cahoon, 283 U.S. 553, 75 L. Ed. 1264, 51 S. Ct. 582 (1931)

Frost v. Railroad Commission of California, 271 U.S. 583, 70 L. Ed. 1101, 46 S. Ct. 605 (1946).

This appeal involves the validity of The Public Utilities Law of the State of Colorado, 1963 CRS 115-1-1 et seq., and particularly portions of Articles 1 and 5 thereof, as hereinafter set forth. Said Law may be found in Colorado Revised Statutes, 1963, Volume 5, at Pages 877 et seq.

Constitutional and Statutory Provisions Involved

The federal and state constitutional provisions, and the state statutory provisions involved in this appeal, are set forth in Appendix E.

Questions Presented

The following questions are presented by this appeal:

1. Whether The Public Utilities Law of the State of Colorado, 1963 CRS 115-1-1 et seq., is repugnant to, and deprives Colorado-Ute Electric Association, Inc. of its constitutional rights under the due process and equal protection clauses of the 5th and 14th Amendments to the United States Constitution, by making Colorado-Ute a public utility but denying it the same rights and opportunities as existing utilities.

2. Whether The Public Utilities Law of the State of Colorado, 1963 CRS 115-1-1 et seq., and particularly 115-1-3(2) thereof, is repugnant to and deprives Colorado-Ute of its constitutional rights under Article 1, Section 10(1) of the United States Constitution, and under the 5th and 14th Amendments to the United States Constitution, by converting it, a cooperative organization serving only 13 corporate members with wholesale electric power and energy under special contract, and not holding itself out to serve the public, and which never held itself out to serve the public, and which is expressly prohibited by its Charter from the State of Colorado from holding itself out to serve the public, into a public utility required to serve the public and to assume all of the other burdens and duties arising out of such status.

Statement of the Case

Preliminary Statement

Colorado-Ute is a non-profit corporation formed under Colorado law, and engaged in the business of the generation and transmission of electric energy, as a wholesaler only, to its members only, principally on the western slope of Colorado. It is owned and controlled by its members, 13 in number. Eleven of its member associations distribute electric energy directly to their users of electricity, primarily in western Colorado, but with one in southwestern Wyoming. One of its member associations (Arkansas Valley G & T) generates and transmits electrical energy in southeastern Colorado for three distribution associations constituting its members, and the other member (Salt River Project) provides electric and water service in the area surrounding Phoenix, Arizona. The distribution members of Colorado-Ute, including several new members, prior to the construction of the Hayden Plant, purchased their power requirements from the Bureau of Reclamation, a non-regulated supplier of electricity, and it was these members that formed Colorado-Ute and subsequently determined that additional power and energy were needed to meet their requirements.

Western Colorado Power Company and Public Service Company of Colorado (hereinafter collectively referred to as the Power Companies), are public utilities engaged in the business of generation, transmission, distribution and sale of electric energy, the former principally operating in the southwestern part of Colorado, and the latter in the eastern part of Colorado. Neither of the Power Companies has the generating facilities or the transmis-

sion and transformation facilities necessary to render service to the new members of Colorado-Ute. Neither of the Power Companies sells any power or energy to Colorado-Ute or to any of its members, and in order to meet the needs of Colorado-Ute's members would have to build generally the same facilities as were constructed by Colorado-Ute.

The Public Utilities Commission of the State of Colorado, hereinafter referred to as the Commission, is an administrative agency of the State of Colorado possessing certain statutory and constitutional authority to regulate public utilities so that adequate service to the public will result.

Background

Colorado-Ute was organized in 1941 as a Colorado corporation not for profit by a group of rural electric distribution associations on the western slope of Colorado, who found at that time that they did not have an adequate power supply to meet the needs of their members, the consumers. The purpose of this corporation was, and still is, to provide low-cost wholesale electrical energy to its member associations, which in turn sell the energy to their members, the ultimate consumers. Because of the intervention of World War II, Colorado-Ute was unable to proceed with plans for the construction of generation and transmission facilities to meet the needs of its members, and accordingly, such members either purchased power from the Bureau of Reclamation on an interim basis or utilized their own diesel generating plants. In recent years, several associations which were purchasing their power requirements from the Bureau of Reclamation determined

that they would soon be unable to obtain sufficient power from the Bureau to meet their growing requirements, and accordingly determined that they would discontinue buying power from this non-regulated supplier. Several of these associations then decided to seek membership in Colorado-Ute, and eventually became members of and contracted with Colorado-Ute for their power requirements.

Because of the growing needs of its members, Colorado-Ute had engineering studies made, and the conclusions reached were (1) that members' demands for power (exclusive of Salt River Project demands) would rise from 72,000 kilowatts in 1960 to 163,000 kilowatts in 1974; (2) that existing available facilities would be inadequate to meet this need (Colorado-Ute having only one small generating plant at Nucla, Colorado); (3) that a steam-fired electric generating plant located near Hayden, Colorado, would be the best way of meeting this need; and (4) that the participation of the Salt River Project would permit the construction of a larger and more efficient plant, thereby reducing costs of power very substantially. The participation of the Salt River Project also afforded a market for the power and energy produced at the Hayden Plant, but with Colorado-Ute's other members having the right to utilize such portion of the output as they needed, with the ultimate expectation that such members would eventually utilize the entire output of the plant.

Colorado-Ute Application

Just shortly before Colorado-Ute's new members joined with it, the Colorado Legislature passed a law in April, 1961, purporting to make electric cooperatives pub-

lic utilities, and to require that such cooperatives obtain a certificate of public convenience and necessity before undertaking new construction. 1963 CRS 115-1-3(2) and 115-5-1. While there was some question whether Colorado-Ute was a public utility under this law, it determined that the most expeditious way to proceed was to apply for a certificate, rather than either ignoring the act or testing its validity through the courts. The latter remedy was particularly inappropriate in view of the long delay that would ensue and the growing needs of Colorado-Ute's members for power. Thus, Colorado-Ute applied to the Commission, requesting (1) a certificate of public convenience and necessity authorizing the construction of a generating plant near Hayden, Colorado, together with related transmission lines and other facilities, and (2) authority under 1963 CRS 115-1-4(2) to execute notes payable to the United States of America in an amount not to exceed $22,876,000 and mortgages to secure the notes in order to finance the project. These applications were filed in May and June, 1962.

PUC Decision

Shortly after Colorado-Ute's applications were filed with the Commission, the Power Companies filed protests, alleging, in general, that the granting of the applications would adversely affect them. Hearings were held commencing June 26, 1962, and continuing intermittently through October 4, 1962. Briefs were subsequently filed with the Commission, closing arguments were made, and on February 21, 1963, the Commission, acting through two commissioners, entered its Decision No. 60156 (Appendix A), authorizing, in general, the construction of the Hayden Plant and certain of the related lines and facilities,

and the issuance of notes by Colorado-Ute in the amount of $22,876,000 to finance the project. The decision generally indicated that the Plant and the other facilities authorized would not duplicate existing facilities, and it specifically denied Colorado-Ute authority to construct a few facilities which it found would duplicate existing facilities. The decision also specifically provided that Colorado-Ute could use the authorized facilities to supply service only to its existing members, and that the grant of the certificate was in the public interest. A dissenting opinion of one commissioner asserted that the certificate should not be granted, but even the dissent failed to find that there would be any duplication except as to the same facilities specifically denied by the majority. These facilities are not in issue in this proceeding.

District Court Decision

The Power Companies thereafter filed Petitions for Rehearing with the Commission, which were denied. They then obtained a writ of certiorari from the District Court for the County of Montrose, State of Colorado, and asked the Court to stay or suspend the effective date of the Commission's decision pending review. Following hearing this request was denied on the basis that neither company had shown that the construction of the Hayden Plant would cause damage to it. In view of this decision, Colorado-Ute commenced construction of the Plant and related facilities, spent more than $30,000,000, completed the project, undertook commercial operation on July 1, 1965, and has operated the project commercially ever since.

Shortly after the District Court denied the Power Companies' request for a stay, oral arguments on the

merits were held, and on December 5, 1963, the Court entered judgment (Appendix B) affirming the decision of the Commission. In its Judgment, the Court expressly passed upon the interest of the Power Companies in the proceeding, pointing out that they had been aptly described as "investigators and informants," and further pointed out that the Power Companies were selling no power to either the old or the new members of Colorado-Ute.

Supreme Court Proceedings and Decision, including how Federal Questions Were Raised, and Dissenting Opinion

On January 20, 1964, the Power Companies docketed their appeal in the Supreme Court of the State of Colorado, briefs were filed by all parties, and oral arguments presented to the Court on September 22, 1964. On October 8, 1964, the Court entered an Order directing the parties to re-appear and orally argue five enumerated questions posed by the Court, including the question of whether it was necessary to construe the Public Utilities Act in such a way as to hold Colorado-Ute "as not being a public utility in order to avoid unconstitutionality on the basis that the other construction would be in clear violation of the Federal Fourteenth Amendment". (This was the first stage at which federal constitutional questions were raised).

On October 20, 1964, all parties re-appeared before the Court, presented additional oral arguments on the five questions posed, and on February 14, 1966, the Court (Appendix C) reversed the judgment of the District Court

and ordered it to direct the Commission to vacate and set aside its decision.

In its opinion and judgment of February 14, 1966, the Court specifically held that the 1961 amendments to The Public Utilities Law, which generally conferred jurisdiction over electric cooperatives on the Commission and purported to make such cooperatives public utilities, did not violate either the Constitution of Colorado or the Constitution of the United States. One justice dissented, however, holding that the legislature may not by fiat make enterprises, which would not fall within the traditional meaning of the term, public utilities. The dissent also asserted that the effect of the majority opinion was to make the Public Utilities Act (1) unjustly interfere with private property rights in contravention of the due process clause of the 14th Amendment to the United States Constitution; (2) infringe upon private contractual rights in violation of Article 1, Section 10(1) of the United States Constitution; and (3) violate the Enabling Act of Colorado, which recognizes implicitly property rights and the freedom to enter into private contracts. The dissent also asserted that selecting only electric cooperatives for regulation as public utilities violates the equal protection clause of the 14th Amendment to the United States Constitution.

On February 28, 1966, Colorado-Ute timely filed its Petition for Rehearing, asserting, in general, that by virtue of the Court's application of The Public Utilities Law, the Law violates the constitutional rights of Colorado-Ute under the due process and equal protection clauses of the 14th Amendment to the United States Constitution, and also under Article 1, Section 10(1) and the 5th Amend-

ment to the United States Constitution. Colorado-Ute also requested that the Court, in the event its Petition for Rehearing were denied, grant a stay of execution until the final disposition of this matter by the Supreme Court of the United States.

On March 14, 1966, the Supreme Court of Colorado denied Colorado-Ute's Petition for Rehearing, and in an Addendum (Appendix D) replied in some detail to the constitutional assertions previously made, and denied that the Public Utilities Law, as applied, violated the constitutional rights of Colorado-Ute. The Court also granted a stay of execution of its judgment pending review by the Supreme Court of the United States.

The Questions are Substantial

The issues presented by this appeal are of importance not only to the parties involved, but also to many persons and groups who are not before the Court. Included in this latter group are the 13 members of Colorado-Ute, and the 40,000 Colorado families served (whose power bills would be reduced by some $13,000,000 in the initial 10-year period of operation of the Hayden Plant), some of whom would be unable to get electric service without the facilities struck down by the Colorado Supreme Court. Also included are the many customers served by the Salt River Project in Arizona, who would also benefit by the substantial savings made possible by the Hayden Plant. Also interested are the Administrator of the Rural Electrification Administration (who initially approved the project and loaned over $20,000,000 for its construction), the Secretary of the Interior, and the Bureau of Reclamation (whose Commissioner and other personnel testified in

support of the application). Also interested are the Colorado Public Utilities Commission (which approved the project), and the Colorado Water Conservation Board (whose Acting Director supported the project and pointed out the $2,000,000 to $3,000,000 benefits which would accrue annually to the Colorado River Basin Fund, thereby resulting in tremendous economic benefits to Colorado and the development of its water resources). In truth, the determination of the issues involved in this appeal is of importance, in one way or another, to all of Colorado.

The issues are also of importance to the Power Companies, neither of which has any generating facilities capable of meeting the needs of Colorado-Ute and its members, and either of which would have to construct a new plant and new transmission and transformation facilities to meet the needs to be served out of the Hayden Plant. Neither of the Power Companies involved in this proceeding nor any other power company in the state of Colorado has the facilities to meet the needs of Colorado-Ute's members. For the needs of these members to be met, the facilities authorized by the Commission would have to be constructed by someone. The so-called "new members" of Colorado-Ute had been receiving service from the Bureau, which is not a public utility, and not one of them was receiving service from the Power Companies. These members desired and needed additional service, and contracted with Colorado-Ute for their power requirements. The law of Colorado, as construed by the Colorado Supreme Court, makes both Colorado-Ute and the Power Companies public utilities. But the same law, as construed and applied by the Court, gives a pre-emptive right to the Power Companies to serve these new members of Colorado-Ute, and denies Colorado-Ute the right to do so. This

is particularly astounding since Western never even contended that it wanted to serve these new members or had the ability to do so, and Public Service had no facilities with which to render such service. The real importance to the Power Companies, of course, is the determination of whether REA-financed electric cooperatives will be allowed to exist on an equal basis with them in Colorado.

Insofar as Colorado-Ute is concerned, the dissenting opinion of Justice Frantz of the Colorado Supreme Court points out the importance of this case, stating that the majority opinion "has effectively incapacited it (Colorado-Ute) as the supplier of energy for its members." The dissent also points out that the majority opinion has "a devastating effect upon a legitimate enterprise for which there has been a very substantial investment" (an investment of some $30,000,000 alone in the Hayden Plant and related facilities, a plant which has been in commercial operation for approximately the past year).

The legal issues are also of substance and importance, as follows:

1. *Whether The Public Utilities Law of the State of Colorado,* 1963 *CRS* 115-1-1 *et seq., is repugnant to, and deprives Colorado-Ute Electric Association, Inc. of its constitutional rights under the due process and equal protection clauses of the 5th and 14th Amendments to the United States Constitution, by making Colorado-Ute a public utility but denying it the same rights and opportunities as existing utilities.*

The Public Utilities Law of the State of Colorado, as applied by the Colorado Supreme Court, denies Colorado-Ute the right to furnish power and energy to its members, and gives the Power Companies the exclusive right and

monopoly to furnish such service. This Court has repeatedly held that the constitutional guaranty of equal protection of the laws, as guaranteed by the 14th Amendment to the United States Constitution, means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances. *Truax v. Corrigan*, 257 U.S. 312, 66 L. Ed. 254, 42 S. Ct. 124, 27 A.L.R. 375 (1921). Here, Colorado-Ute and the Power Companies are all in the same business and have been for many years—the business of generating and transmitting electricity. The Power Companies have been regulated by the State as public utilities for many years, but Colorado-Ute, as a cooperative serving members only, was not subject to regulation until 1961. By virtue of the 1961 amendments to the Public Utilities Law (1963 CRS 115-1-3) however, the State attempted to place Colorado-Ute under regulation, and also attempted to make it a public utility, but, as the Court's opinion indicates, with only few of the rights of other public utilities. When the Power Companies first came under regulation by the State, they were permitted to serve not only their existing customers, but also new customers. Colorado-Ute, however, has been denied such a right. The Colorado law, therefore, clearly gives the Power Companies a preference over Colorado-Ute insofar as service to new customers is concerned, despite the fact that both Colorado-Ute and the Power Companies are public utilities. For this type of statutory discrimination to be valid, it must be based on differences that are reasonably related to the purposes of the act in which it is found. *Morey v. Doud*, 354 U.S. 457, 1 L. Ed. 2d 1485, 77 S. Ct. 1344 (1957). Here, it is not.

The discrimination against Colorado-Ute is apparent.

The new members of Colorado-Ute were being served by the Bureau of Reclamation, which is not a "public utility." Not being a public utility, and being an agency of the United States, the Bureau is not subject to the jurisdiction of the Commission and cannot be required to serve anyone. The members of Colorado-Ute can, at their discretion, and without the approval of anyone, cease purchasing power from the Bureau. But if they do so, says the Colorado Supreme Court, they must then buy their power from the Power Companies. Indeed, they must buy from the Power Companies even though these companies will have to construct new facilities to serve them. And they cannot buy from Colorado-Ute, even though it theoretically is a public utility with theoretically equal rights. This type of discrimination is not based on differences that are reasonably related to the purposes of the act, and cannot be justified. *Morey v. Doud*, supra.

At the time of Colorado-Ute's application in the instant matter, neither it nor any of the parties hereto had any generating facilities capable of meeting the needs of Colorado-Ute's members, needs which had previously been met by the Bureau of Reclamation. Assuming *arguendo* the right of the State to regulate Colorado-Ute, the question becomes whether the State can make Colorado-Ute a second-class public utility, one which can never generate, transmit, and sell additional electric power except with the consent of the Power Companies. If Colorado-Ute is a public utility, then it must be afforded the same rights as other public utilities in the same business, that is, the right to generate and transmit electricity and to serve new customers. It is the character of the business and not the date when it began that is determinative. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 76 L. Ed. 747, 52 S. Ct.

371, PUR 1923B 433 (1932). A statute which attempts to give an economic advantage to those engaged in a business at an arbitrary date as against all those who enter the industry after that date is not a regulation of business in the interest of the public, and denies equal protection of the laws. *Mayflower Farms v. Ten Eyck,* 297 U.S. 266, 80 L. Ed. 675, 56 S. Ct. 457 (1936); *Morey v. Doud,* supra. The effect of the Colorado Supreme Court's application of the Public Utilities Law is to create a closed class, namely those existing as regulated utilities prior to 1961, which alone may engage in the generation business. There is no logical relationship for this monopolistic grant to those utilities existing before 1961, and the denial of such rights to those utilities which, though existing before 1961, were simply not subject to state regulation.

Both the 5th and 14th Amendments to the United States Constitution protect a person against the deprivation of his property without due process of law. The term "property" includes the right to acquire, use, and dispose of property. *Terrace v. Thompson,* 263 U.S. 197, 68 L. Ed. 255, 44 S. Ct. 15 (1923). Without the $30,000,000 plant which Colorado-Ute constructed and operated pursuant to authority granted by the Commission, it is unable to meet the needs of its members, and is thereby virtually put out of business. Colorado-Ute's inability to henceforth use and operate the Hayden Plant violates its constitutional rights, we submit, to use and operate its property. *Washington ex rel. Seattle Title Trust Co. v. Roberge,* 278 U.S. 116, 73 L. Ed. 210, 49 S. Ct. 50, 86 A.L.R. 654 (1928).

An example of the discriminatory treatment afforded Colorado-Ute under the Public Utilities Law can be seen in the decision of the Colorado Supreme Court. The de-

termination of the issue of public convenience and necessity is ordinarily a determination of fact, and the determination of such issue is for the Commission, not for the Court. *Pirie v. PUC*, 72 Colo. 65, 209 P. 640 (1922); *Application of Baker Sales Barn, Inc.*, 140 Mont. 1, 367 P. 2d 775 (1962); (Cf. Colorado Constitution, Article XXV). The Colorado Supreme Court has consistently held that findings of fact supported by competent substantial evidence will not be disturbed. *PUC v. Loveland*, 87 Colo. 556, 289 P. 1090 (1930). This pronouncement is in accordance with the mandate of the applicable statute, 1963 CRS 115-6-15, which provides, in general, that the findings of the Commission on disputed questions of fact shall be final and not subject to review. Yet, in the instant case, while the Commission found that public convenience and necessity required the construction of the Hayden Plant, the Supreme Court found to the contrary. Since Colorado-Ute has been treated differently than other litigants in the Colorado Supreme Court under the Public Utilities Law, the rule becomes applicable that due process and equal protection of the laws are violated by a course of procedure which treats persons similarly situated in a different manner. *Tinsley v. Anderson*, 171 U.S. 101, 43 L. Ed. 91, 18 S. Ct. 805 (1898).

A final example of the unfair and discriminatory treatment given Colorado-Ute can be seen in the suggestion of the Colorado Supreme Court that Colorado-Ute should have voluntarily refrained from proceeding under the Commission's grant of authority until the Court had made its final review. Under Colorado law, 1963 CRS 115-6-16(1), a party has the right to proceed under the Commission's decision unless a stay is granted by the Courts. Here, the District Court, following the reception of evi-

dence and the holding of a full hearing, refused to grant the Power Companies a stay because, as it held, they were not adversely affected. If the District Court had ruled otherwise, then the Power Companies would have been entitled to a stay but they would have also been required by law to post a bond in sufficient amount to protect Colorado-Ute. The effect of the Colorado Supreme Court's pronouncement in this regard is that Colorado-Ute should have voluntarily given the Power Companies the benefit of a stay, but without any requirement that the Power Companies give Colorado-Ute the benefit of protection through an adequate bond. Such a suggestion is contrary to the basic legal principles of Colorado law and to basic concepts of fairness and equity, but illustrates the peculiar position in which the Court placed Colorado-Ute.

In closing our argument on this question, a brief summary is appropriate. Neither the Power Companies nor Colorado-Ute were serving the "new members" of Colorado-Ute. Neither the Power Companies nor Colorado-Ute had the facilities to meet the needs of these new members. These new members desired and needed service from some source other than the Bureau of Reclamation. All of the suppliers to which it could turn were, under Colorado law, public utilities. It turned to Colorado-Ute. But Colorado-Ute, under the Public Utilities Law, says the Colorado Supreme Court, cannot serve these members. They must turn instead to the Power Companies, which were public utilities before 1961, when Colorado-Ute was made a public utility. This grant of monopolistic rights to the Power Companies, and the denial of the rights of Colorado-Ute to render service to its new members, violates, we submit, the rights of Colorado-Ute under the 5th and 14th Amendments to the United States Constitution. There is no rea-

son for this discrimination against Colorado-Ute, and the statute which permits it must be declared unconstitutional.

2. *Whether The Public Utilities Law of the State of Colorado,* 1963 *CRS* 115-1-1 *et seq., and particularly* 115-1-3(2) *thereof, is repugnant to and deprives Colorado-Ute of its constitutional rights under Article* 1, *Section* 10(1) *of the United States Constitution, and under the 5th and 14th Amendments to the United States Constitution, by converting it, a cooperative organization serving only* 13 *corporate members with wholesale electric power and energy under special contract, and not holding itself out to serve the public, and which never held itself out to serve the public, and which is expressly prohibited by its Charter from the State of Colorado from holding itself out to serve the public, into a public utility required to serve the public and to assume all of the other burdens and duties arising out of such status.*

The Public Utilities Law of the State of Colorado, as applied by the Colorado Supreme Court, and particularly 1963 CRS 115-1-3, converts Colorado-Ute, a cooperative organization serving only its 13 corporate members with wholesale electric power and energy under special contracts, and not holding itself out to serve the public, and which is expressly prohibited by its Charter from the State of Colorado from holding itself out to serve the public, into a public utility required to serve the public and to assume all of the other burdens and duties arising out of such status. The dissenting opinion points out some of these burdens as follows:

> "To place a corporation not purposing to serve the public indiscriminately in the status of a public utility means (1) that it must sell to all

> whom it physically can serve rather than retain its constitutional right of being at liberty to contract with whom it pleases, and (2) that, although its operation is limited, its property is by decree dedicated to a public use, a taking of property without due process." (Appendix C, Dissent).

The State cannot by mere legislative fiat convert one who has not dedicated his property to public use into a public utility, for such would be the taking of private property for public use without just compensation. *Producers Transportation Co. v. Railroad Commission,* 251 U.S. 228, 64 L. Ed. 239, 40 S. Ct. 131 (1920); *Michigan Public Utilities Commission v. Duke,* 266 U.S. 570, 69 L. Ed. 445, 45 S. Ct. 191, 36 A.L.R. 1105 (1925); *Frost Trucking Co. v. Railroad Commission,* supra; *Smith v. Cahoon,* supra; and *Stephenson v. Binford,* 287 U.S. 251, 77 L. Ed. 288, 53 S. Ct. 181, 87 A.L.R. 721 (1932).

The business or property, in order to be affected with a public interest, must be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby in effect granted to the public. *Williams v. Standard Oil,* 278 U.S. 235, 73 L. Ed. 287, 49 S. Ct. 115, PUR 1929A 450 (1929). And the mere declaration by the legislature that a business is affected with a public interest is not conclusive on the Court. *Wolff Packing Co. v. Court of Industrial Relations,* 262 U.S. 522, 67 L. Ed. 1103, 43 S. Ct. 630, 27 A.L.R. 1280 (1923). A key question in this proceeding is whether, assuming *arguendo* that the State has the power to subject a company in the position of Colorado-Ute to regulation, can it go beyond this and also make it a *public* utility. While some cases indicate that regulation is permissible, the above cases clearly show that such regulation cannot constitutionally go so

far as to require a devotion of the property involved to the public. Yet, this is precisely what the Colorado law does.

The dissenting opinion clearly points out that the vice of the Colorado law is not that it subjects Colorado-Ute to regulation, but that it goes far beyond regulation, makes Colorado-Ute a public utility, and thereby precludes it from benefitting from contracts entered into with its members and others, all in violation of Article 1, Section 10(1) of the United States Constitution. This article provides that no state shall pass any law impairing the obligation of contracts. Here, contracts were entered into by and between Colorado-Ute and its members providing for the furnishing of electric power and energy to its members, and by and between Colorado-Ute and the Bureau of Reclamation providing, inter alia, for exchanges of power and energy. These contracts were and are beneficial to Colorado-Ute, but the dissenting opinion recognizes the obvious when it concludes that the Court's decision "has effectively incapacitated it (Colorado-Ute) as the supplier of energy for its members." The deprivation of these contractual benefits violates the constitutional provision referred to above. *Northern Pacific R.R. Co. v. Minnesota ex rel Duluth,* supra.

In summary, it is beyond the power of a State legislature to depart from the traditional meaning of "public utility". It cannot impose the burdens of a public utility upon one who has not assumed the usual posture of a public utility, that is, one who has not held himself out to serve the public. Colorado-Ute has never held itself out to serve the public, is prohibited by its Charter from the State of Colorado from doing so, and even by virtue of

the certificate granted by the Commission is limited to serving its present 13 members. We submit that the 1961 Amendments to The Public Utilities Law, to the extent that they purport to make Colorado-Ute a public utility and to make applicable the rules usually relating to public utilities, deprive Colorado-Ute of its constitutional rights under the 5th and 14th Amendments and Article 1, Section 10(1) of the United States Constitution.

In closing, it is submitted that the State of Colorado has, in the instant matter, first made a public utility out of a business which has not dedicated its property to public use. Having then declared such business to be a public utility, it then relegates it to a second-class status inferior to all other public utilities in the state by depriving it of rights recognized and confirmed in such other public utilities. In taking such action, the State of Colorado has deprived Colorado-Ute of equal protection of the laws, due process of law, and freedom of contract.

We believe the questions involving these violations of the constitutional rights of Colorado-Ute are substantial and of public importance, and that the Court should hear argument concerning them.

Respectfully submitted this 5th day of August, 1966.

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Certificate of Service

I, John J. Conway, of Denver, Colorado, being a member of the bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Jurisdictional Statement upon all adverse parties of record herein, by depositing two true and correct copies thereof in a United States post office mail box with first class postage prepaid, addressed to counsel of record at their post office addresses, this 5th day of August, 1966, as follows:

Irvine & Baucom, and
Sidney G. Baucom, Esqs.,
1407 W. North Temple,
Salt Lake City, Utah

Loesch & Kreidler and
Harrison Loesch, Esqs.,
447 Main St.,
Montrose, Colorado

Barry & Boyle, and
John R. Barry, Esqs.,
946 Metropolitan Bldg.,
Denver, Colorado 80202

Lee, Bryans, Kelly & Stansfield, and
Bryant O'Donnell, Esqs.,
990 Public Service Company Bldg.,
Denver, Colorado 80202

said counsel being all of the counsel of record for the adverse parties herein; and that two copies were also sent by first class mail, postage prepaid, to counsel of record

for. The Public Utiilties Commission of the State of Colorado and the Individual Members Thereof, by first class mail, postage prepaid, this 5th day of August, 1966, as follows:

Duke W. Dunbar, Attorney General,
and Robert V. Kessler, Assistant, Esqs.,
506 State Services Bldg.,
Denver, Colorado 80203

John J. Conway

John J. Conway

Appendix A

(Decision No. 60156)

BEFORE THE
PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

IN THE MATTER OF THE APPLICATION OF COLORADO-UTE ELECTRIC ASSOCIATION, INC., TO CONSTRUCT AN ELECTRIC GENERATING PLANT NEAR HAYDEN, COLORADO, AND ELECTRIC TRANSMISSION LINES TO CONNECT SAID PLANT TO ITS EXISTING GENERATION AND TRANSMISSION SYSTEM, TO THE PRESENT AND PROPOSED GENERATION SYSTEM OF THE UNITED STATES BUREAU OF RECLAMATION, AND TO THE PRESENT AND PROPOSED SYSTEMS OF ITS MEMBERS.

Application No. 19098

IN THE MATTER OF THE PETITION OF COLORADO-UTE ELECTRIC ASSOCIATION, INC., FOR AN ORDER AUTHORIZING IT TO EXECUTE A NOTE OR NOTES SECURED BY A MORTGAGE OBLIGATION WITH THE UNITED STATES OF AMERICA.

Application No. 19156—Amended

February 21, 1963

Appearances:

Raphael J. Moses, Esq., Boulder, Colorado; J. A. Hughes, Esq., Montrose, Colorado, and Philip P. Ardery, Esq., Louisville, Kentucky, for Applicant; Bryant O'Donnell, Esq., Denver, Colorado, and Donald D. Cawelti, Esq., Denver, Colorado, for Protestant, Public Service Company of Colorado; Sidney G. Baucom, Esq., Salt Lake City, Utah; John R. Barry, Esq., Denver, Colorado, and Harrison Loesch, Esq., Montrose, Colorado, for Protestant, Western Colorado Power Company; D. B. Hyer, Jr., Pueblo, Colorado, for Southern Colorado Power Company, as its interest may appear; E. R. Thompson, Denver, Colorado, and Paul M. Brown, Denver, Colorado, Staff of Colorado Public Utilities Commission.

STATEMENT

Horton, Commissioner:

The Applicant herein is Colorado-Ute Electric Association, Inc., hereinafter referred to as "Ute" or "Applicant." The protestants are the Western Colorado Power Company and Public Service Company of Colorado, hereinafter referred to as "Western" and "Public Service." The proposed plant will be referred to as the "Hayden Plant."

The Applicant is an electric cooperative association under the laws of Colorado, engaged principally in the generation, purchase, transmission and sale at wholesale of electricity to its members. All three are public utilities under the law and are subject to the jurisdiction of and regulation by the Colorado Commission.

The Applicant has filed Application No. 19098 requesting a certificate of public convenience and necessity to construct (a) a new steam turbine electric generating plant near Hayden, Colorado, with a rating of 150,000 kilowatts, designed for firing with pulverized coal, together with the usual attendant facilities, and (b) transmission lines, substations, terminals, and switching facilities, and other facilities necessarily incidental to the transmission of electrical power and energy to be generated at such plant, intending, where and when feasible, to use circuits and transmission facilities of the Bureau of Reclamation, of Public Service, and others.

The Applicant proposes to generate such electric power and energy "for sale to its members," to-wit:

San Miguel Power Association, Inc.,
Empire Electric Association, Inc.,
LaPlata Electric Association, Inc.,
Delta-Montrose Rural Power Lines Association,
San Luis Valley Rural Electric Cooperative, Inc.,
The Grand Valley Rural Power Lines, Inc.,
Holy Cross Electric Association, Inc.,
White River Electric Association,
Yampa Valley Electric Association,
Gunnison County Electric Association, Inc.,
another G. & T. Cooperative-Arkansas Valley,
G. & T. Inc., all of Colorado,
Bridger Valley Electric Association, Inc., of Wyoming,
Salt River Project Agricultural Improvement and Power Dist. of Arizona.

Arkansas Valley G. & T., herein referred to as "Arkansas Valley," operates in Colorado and has three distributing members, to-wit:

San Isabel Electric Association, Inc.,
Southeast Colorado Power Association, Inc., and
Sangre De Cristo Electric Association, Inc.

The above-named Colorado cooperatives are all consumer-owned electric cooperatives, who distribute electricity to the ultimate consumer, with the exception of Arkansas Valley, which is presently engaged in the sale at wholesale of electricity to its members.

Salt River Project Agricultural Improvement and Power District is an agricultural improvement district, organized under the laws of Arizona, hereinafter referred to as "Salt River" or "District." The District owns and operates an electric system in the central part of Arizona in conjunction with its operation of the Salt River Reclamation Project, and serves over 100,000 customers with electricity in Arizona.

Bridger Valley Electric Association is a cooperative operating in Wyoming, which delivers electricity to the ultimate consumer.

The Applicant has also filed a petition (Application No. 19156), for an order authorizing a proposed issue of securities, wherein Applicant will borrow from the Rural Electrification Administration, an agency of the Federal Government, by the execution of a note or notes payable to the United States of America, and a mortgage or mortgages to secure said notes, in an amount not in excess of $22,876,000, which, together with funds to be provided by

Salt River Project, will be used for the construction of the facilities asked for in Application No. 19098. It is proposed that Salt River will advance toward said construction the sum of $8,610,000, which said sum will be in the nature of a prepayment for the 50,000 KW of capacity to be furnished by Ute to Salt River.

Applicant contends that the Rural Electrification Administration has approved the said loan, and said administration is now awaiting approval of the Colorado Commission.

Both applications were consolidated for hearing.

Separate protests to the above applications were filed by Public Service and Western, wherein they collectively allege: (1) That each was a public utility subject to the jurisdiction of the Colorado Commission; that they are engaged in the generation, transmission and distribution of electric power and energy in certain areas in the State of Colorado; that all or a portion of the lines, plant and facilities proposed to be constructed by Applicant would cause physical and uneconomical duplication of plant, lines and systems of said companies.

(2) Protestants further allege: That they have for many years past maintained electric generating facilities and transmission lines and related facilities, adequate and sufficient to meet all present and future needs of the areas served by them, and have held themselves out as ready, willing and able to render wholesale electric service to Applicant, or any of its members.

(3) Protestants further allege: That there does not

exist any need nor necessity for the construction of the proposed plant, and that if such construction were authorized by this Commission it would result in substantial damage to said protestants and their electric consumers.

(4) Protestants further allege: That the statutes of the United States of America creating the Rural Electrification Administration did not authorize a loan to be made to Applicant for the purposes specified in said application, and that such loan would be beyond the power and authority of the Administrator of the Rural Electrification Administration.

The instant application for a certificate of authority was filed pursuant to 115-5-1 CRS 1953, which provides as follows:

> "*New construction extension.* (1) No public utility shall begin the construction of a new facility, plant, or system, or of any extension of a new facility, plant, or system, without first having obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such construction. Sections 115-5-1 to 115-5-4 shall not be construed to require any corporation to secure such certificate for an extension within any city and county or city or town within which it shall have heretofore lawfully commenced operations, or for an extension into territory, either within or without a city and county or city or town, contiguous to its facility, or line, plant or system and not theretofore served by a public utility, providing the same commodity or service, or for an extension within or to territory already served by it, necessary in the ordinary course of its business * * *."

There is in the mind of the Commission a doubt as to whether or not the construction of the proposed facilities falls within the above set forth statutory exemptions. However, Applicant, by the filing of Application No. 19098, has, in our judgment, interpreted that the proposed construction of facilities is not within the exemptions and, for the purpose of this decision, we accept Applicant's election.

Ute is a cooperative corporation organized and promoted by the consumer-owned cooperatives, for the express purpose of purchase, generation and transmission over high voltage lines electric power and energy to be sold to the consumer-owned cooperatives for distribution to their members and customers who are the ultimate consumers. These consumer-owned cooperatives, who, by Colorado law have been declared utilities, are serving in some eighteen or twenty counties in Western Colorado, and are now classified by Congress as preference customers in the Colorado River Storage Project. In addition, Colorado-Ute proposes to serve in six counties in the Rio Grande River Drainage and the Arkansas Valley G. & T. on Colorado's Eastern slope. Generally speaking, these consumer-owned cooperatives serve the sparsely settled areas; however, we do find exceptions. They also serve towns in the counties of Archuleta, San Miguel, Montrose, Montezuma, Dolores, Gunnison, Moffat, Routt, Rio Blanco, and possibly others. The distinguishing feature of these consumer-owned utilities is that all of them—without exception—are financed, approved and sponsored by the Rural Electrification Administration, an agency of the United States Government.

Western serves exclusively in Southwestern Colorado,

generally serving the towns beginning at Durango, thence north via Silverton, Ouray, Montrose, Olathe to Delta, thence easterly to Somerset via Hotchkiss and Paonia, with the exception of Delta, which serves itself with a municipal plant. They also serve some rural loads, being that territory immediately adjacent to their high voltage transmission and distribution lines. They also serve mining loads in the Counties of San Juan, San Miguel and Ouray. Western's predecessors served largely the mines adjacent to Silverton, Telluride, Rico and Ouray. In fact, Western's predecessor company was largely instrumental in developing high voltage transmission lines in serving the mining industry of the San Juan in the early days of Colorado history.

Public Service is the largest investor-owned electric utility in the State, especially as it pertains to the number of customers served. It has operating divisions and certain of these divisions are involved in rendering service in area contiguous to areas where Ute desires to serve. Generally speaking, as far as Public Service is concerned, it serves incorporated cities, towns and communities along the main transmission lines serving these towns.

In the Grand Junction Division, Public Service serves the following towns and communities: Grand Junction, Grand Valley, New Castle, Palisade, Rifle, Silt, Fruita, DeBeque, Clifton, Carbondale, and wholesale to the Town of Glenwood Springs. The company also serves territory contiguous to these towns and, generally, in more or less of a corridor between the towns.

In the San Luis Valley District, Public Service serves in the following towns and communities: Alamosa, An-

tonito, Blanca, Del Norte, Hooper, LaJara, Manassa, Moffat, Monte Vista, Mosca, Romeo, Sanford, San Luis, San Pablo, Saguache, and Fort Garland. More or less the same situation prevails here as in the Grand Junction District. Public Service serves towns and contiguous territory thereto and in corridors between the towns. Public Service does serve in rural areas, but generally in those instances where they are immediately adjacent to towns or cities or in the corridor between towns or cities.

If Application No. 19098 is narrowed down to a classical application for a certificate of public convenience and necessity to construct a generating plant and attendant facilities, the questions here to be determined would be materially simplified. However, a careful review of the testimony of the Bureau witnesses and the record herein made and with consideration being given to the theory of protestants, the issues herein are broadened and go a great deal further than the authorization to build facilities at Hayden. Rather, in truth and in fact, it is our opinion that in addition, it is a joint application of Ute and the Bureau to firm up Colorado River Storage Power.

This poses important questions to be determined:

1. Will the granting of a certificate in Application No. 19098 be in or contrary to the public interest?

2. Does future public convenience and necessity require the construction of Hayden Plant and facilities for the purposes indicated?

3. Does present public convenience and necessity require the immediate construction of the Hayden Plant and facilities?

4. Is the firming up of Bureau power in the public interest?

5. Should the Commission authorize a proposed issue of securities in Application No. 19156, wherein Applicant will borrow from The United States of America $22,876,000 through the Rural Electrification Administration agency?

The evidence and record clearly indicate that all members of Ute are preference customers of the Bureau by Congressional Act; that the Bureau at the present time is furnishing a large share of electric power, not from the Colorado River Storage Project which is not yet fully completed, but rather from the Missouri River Basin. It appears that the Bureau has determined to substitute power which will originate in Colorado River Storage for power now being served from the Western Division of the Missouri River Basin. The Bureau has sent out applications to Ute and its members as to their requirements for Colorado River Storage Project power.

The Colorado River Storage Project is described by Commissioner Dominy in his testimony, as follows:

"It is a great multiple-purpose undertaking which the Federal Government will expend a considerable sum of money in storing and regulating the waters of the Upper Colorado River Basin for multiple-purpose uses, for irrigation, for municipal and industrial water, for power, for fish and wildlife enhancement, and recreation, river regulation and other vital aspects leading to a greater economy for this Upper Basin five state area • • • • • now, the cost of the participating projects are consider-

ably greater than the ability of the farmers to repay; so in order for these Mountain States to have the advantage of the economic buildup resulting from this project and the irrigation projects, it is necessary to have revenues over and above those that will be returned from the payment of the farmers on the participating projects, and these revenues are, of course, provided by the return from power over and above the requirements to pay the power allocation out with interest. * * * * * The Colorado Storage Project embodied a very fixed and definite schedule and limit whereby the Congress stipulates in the law that no participating project or main stem feature, such as Glen Canyon or Curecanti or Flaming Gorge—in other words, no separate feature of this project can be undertaken until a certification can be made that revenue will be available so that this particular unit will be paid out in full within 50 years from its completion, so we can't start any participating project until we have certainty of revenues from the sale of power, the sale of water, and other returns from the project on a schedule that will be demonstrable to Congress that we are within the requirements of the law."

Mr. Dominy further stated:

"I announced shortly thereafter at the Colorado Electric Association's annual meeting in Grand Junction, Colorado, last year, the Bureau's intention to make the Federal Power system as valuable as possible to all of the utilities. I recognized then that neither the hydroplants of the Storage Project nor any one public or private utility could fill in all of the predicted load growth in the four upper Colorado Basin states * * * estimated by the Federal Power Commission to increase from 15,242

million kilowatt-hours used in 1960 to 66,737 million kilowatt-hours in 1980. It would take all of the combined efforts of the Bureau and all utilities to meet this need. * * * Hydro and thermal generation can and should complement each other for the mutual advantage of all concerned. * * * I am desirous of taking such action as will assure the maximum utilization of the Federal investment in Colorado River Storage Project power for the maximum number of people. * * * The Bureau has made an analysis of the transmission system needed for delivery of Storage Project power when coordinated with the installation of 600,000 kilowatts of thermal capacity for southern marketing division preference customers. When comparing this system to the system without such steam capacity, our analysis shows (1) reduction of investment costs in transmission facilities of $15 million and (2) savings in transmission losses estimated to have a value of at least $500,000 annually. These savings in costs and the value of transmission losses would amount to about $1 million annually. Wheeling charges for delivery of the 600,000 kilowatt of thermal capacity to preference customers in the southern division would provide another $1 million of additional revenue for the Storage Project.

"Taking into account the savings made available to the Storage Project because of such thermal development, we have determined an appropriate wheeling charge would be $1.75 per kilowatt-year, for the installation of 600,000 kilowatts. The net effect of all these savings and additional revenue is estimated to enhance the Upper Colorado River Basin Fund by upwards of $100 million over the 86 year period used in the Bureau's studies. The cost of the Colorado River Storage Project and of the Participating

Projects is to be returned from the revenues accruing to this Fund.

"I have explained to you the relationship between the Bureau's transmission system and the 600,000 kilowatts of thermal generation which we expect will be built in the Hayden and Shiprock area. My primary interest in this matter is to assure interconnection and transmission service arrangements with all utilities in the area, to assure the greatest possible benefits for the Basin Fund of the Storage Project and to assure all residents of the area the benefits of full utilization of the hydro-electric plants and transmission lines of the Storage Project and the facilities of all utilities in the area."

Several witnesses appeared in support of the application, and it will be our purpose to make a brief review or summary of their testimony.

John J. Bugas, Manager of Ute, identified several contracts and gave testimony as to organization, purposes and plans of Ute, including sources of power. He contended that Ute's proposed plan would offer substantially lower power costs to Ute's members and would stimulate the economy of Western Colorado, and especially the coal industry in Northwest Colorado, and would firm up Ute's existing generation and transmission system.

C. M. Stanley, President of Stanley Engineering Company, the firm employed by Ute to make engineering and economic studies as to the feasibility of the proposed project, also testified. His studies also included design, cost and location of plant. He explained the benefits that in his judgment would accrue to Ute and to its distribu-

tion members. As a result of his studies, he contended that the proposed plant would produce power for Ute at a saving of more than $13,000,000 over the next cheapest source of power—the Colorado River Storage Project—during the first ten years of the existence of the Hayden Plant.

Witness Stanley explained from his studies the benefits to Ute and to the distribution members of Ute, to Salt River, Bureau of Reclamation, and Arkansas G. & T. from the contracts. Under his interpretation of the Salt River Contract, Salt River will advance some eight million dollars for the construction of 50,000 Kw capacity in the Hayden Plant, and also agree to purchase an additional 50,000 Kw of capacity out of the plant. Salt River agrees to pay all transportation incurred to transport the power to its system whereby Ute's responsibility ends at Hayden. In addition, Salt River would pay $75,000 a year for ten years for the use of transmission lines to be built by Ute. That arrangement makes it possible to construct a 150,000 Kw unit instead of 100,000 unit, with the resulting savings in initial cost; it would permit the plant to be loaded from the start so as to achieve the greatest efficiencies in operation and produce the most economical energy and would provide the necessary reserve by the construction of Ute of a single unit. The Salt River contract also permits Ute to withdraw power from the middle block of 50,000 Kw as the same is required by Colorado-Ute's other members, so that an ample supply will always be available to the said members until such time as the entire 100,000 Kw of capacity is utilized. Stanley further contends that the Bureau of Reclamation Contract enables Ute to make deliveries of power and energy to Arkansas Valley G. & T. and to San Luis Valley (as far as Poncha Junction) over

lines of Bureau, and enables service to Bridger Valley and Salt River through displacement of power from Flaming Gorge and Glen Canyon units of the Colorado River Storage project, in addition to giving Ute an interconnection with Bureau of Reclamation transmission grid and greatly strengthening the Ute System.

Stanley further testified that the requirements of Ute were such that existing member loads (other than Salt River) would grow from 72,000 Kw in 1960, to 163,000 Kw in 1974.

The Arkansas Valley G. & T. contract is contended by Stanley to be a further benefit to Ute because it made available to Ute $6,000,000 of REA Loan funds which had previously been allocated to Arkansas Valley, and permits Ute to make delivery to Arkansas Valley at 115 KV at Pueblo and Poncha Junction with Arkansas Valley assuming the cost and responsibility for distributing to its distribution members. The rates of Salt River and Arkansas Valley were based strictly upon cost of service and no capital credits will accrue to either of these members under the terms of their contracts. Stanley offered Exhibit No. 14, wherein he contends the average cost of energy from Hayden Plant to be 8.01 mills delivered to the 11 distribution members averaged over the first ten years of operation as compared to the 1961 cost of 12.5 mills; that the cost to Arkansas Valley would be 5.95 mills.

Mr. Grosvenor, a professor at the Colorado School of Mines, testified that the area in which the plant was to be located had ample reserves of coal, and Mr. Phelps, Vice-president and Chief Engineer of The Peabody Coal Company, which had contracted to supply the coal, testified as

to his company's ability and willingness to supply the coal in accordance with their contract, that is, sufficient coal to supply a 150,000 Kw unit for a period of 26 years at 14.7 cents per million b.t.u., subject to escalation up or down, based on National indexes.

Mr. Gumprecht, the President of Yampa Valley Electric Association, testified concerning the willingness of Yampa Valley to turn over to Ute the necessary water rights to support the plant, and the desire of his member cooperative and the customers served in his area that the application be granted and the plant built.

Mr. Tarr, of the firm of Peat, Marwick, Mitchell and Company, a certified public accountant regularly employed by Ute, testified that Ute would have at the end of the initial ten-year period of operations of the proposed facilities, accumulated more than twelve million dollars if present rates were maintained; that the accumulation of this amount of cash probably would not be permitted to occur, but that in all likelihood the rates to the eleven distribution members would be reduced with the approval of the Colorado Commission; that alternative measures would be to use excess cash available for additions to plant, for prepayment of loans, or for distribution as capital credits to the eleven distribution members.

Mr. Edward Gaither, Manager of Arkansas Valley G. & T., testified as to the need for additional sources of power by the three distribution cooperatives which compose Arkansas Valley G. & T., and it was his opinion that it would be to the best interest of these cooperatives and their consumers for Arkansas Valley to obtain all of its power and energy from Ute.

Harvey McPhail, Executive Secretary of Colorado River Basin Consumers Power, Inc., an organization composed of preference customers in Arizona, Utah, Wyoming, Colorado, and New Mexico, testified that studies indicated that the construction of the Hayden Plant would, when ultimate development occurred, accrue benefits to the Upper Colorado River Basin Fund in excess of two hundred million dollars for the entire 86 year period, through the reduction in initial investment by the United States, savings in transmission losses by the United States, and revenue received by the United States in the form of wheeling charges paid by Colorado Ute and Salt River.

L. R. Kuiper, Acting Director of the Colorado Water Conservation Board, testified that the Basin Fund was to be used for the construction of participating projects in the Upper Basin, and identified 43 projects in Western Colorado that would be built with revenues from the Basin Fund, totaling in cost almost three-quarters of a billion dollars, and stated that anything that enhanced the value or increased the amount of the Basin Fund would assist in accelerating the construction of these projects and benefit the people of Colorado.

Mr. Floyd Dominy, Commissioner of the Bureau of Reclamation of the Department of Interior, affirmed Mr. McPhail's analysis of the effect of the construction of the Hayden Plant insofar as accruing benefits to the Basin Fund were concerned, although he differed somewhat in the magnitude of these benefits. He pointed out that 46% of the savings would inure to the State of Colorado, and urged the approval of the application, stating that the requirements of the Upper Basin States for electric power

and energy would necessitate the best efforts of all suppliers, public and private.

Mr. Wade Taylor, also of the Bureau of Reclamation, confirmed the testimony concerning benefits to the people of Colorado and the Western Slope through the location of steam electric generation in northwestern Colorado, and stated it was important that the application be approved at this time, so that maximum benefits could be obtained.

Numerous other public witnesses, so-called, appeared in support of the application in addition to those mentioned above.

In support of Protestant's protest, several witnesses testified, so we will attempt to briefly summarize a portion of their testimony.

Robert T. Person, President of Public Service Company of Colorado, testified that his Company was the largest investor-owned electric utility operating in Colorado. He described generally his company's operation and its policy to give to its consumers electric energy at the lowest possible cost. This reduction in cost was brought about by technological advances and transmission cost studies, which have resulted in reduction of costs and improvement of service. This, he summarized as follows:

> "It therefore leads me to the statement which I first made, and that is I think we could stack our organization against most any company similarly situated from the standpoint of purely operating efficiency."

The witness testified his company had furnished firm up service for the Bureau of Reclamation in connection with

the Colorado Big Thompson Project. In 1960, Public Service provided firm up power in the amount of 180 million kilowatt hours, and in 1961 they furnished 230 million kilowatt hours.

In answer to general questions as to cost of the generation of power by Ute and his company, he said:

"No, I do not, because I realize that this Commission does not have jurisdiction or responsibility for the tax advantages, principally income tax, state and federal, that Colorado-Ute has, and neither do they have the responsibility for the interest rate that the REAs in general enjoy, and Colorado-Ute in particular in this case, obviously these factors comprise a total increment that if we were to attempt to compete with them, keeping in mind that we are a full taxpaying electric power supplier and that we must obtain our capital funds on the open market completely, that we are not in a position to compete on a net cost of power or a strictly low cost of power basis which apparently is the principal basis upon which the Applicant has based his case, we would be unable to compete on a comparable basis by virtue of those advantages."

Mr. L. J. Baudino, Vice-President and General Manager of Western, testified Western is an operating investor-owned electric utility, made up of many pioneer operating companies, including the historic Telluride Power Company, at which many of the early day high voltage transmission experiments were conducted. Western was incorporated in 1913, and has continuously operated and served a portion of the Western Slope, serving all types of electric loads and much of the terrain served is in a very rugged mountain area.

Western presently has an operating agreement with Ute which was negotiated some years ago, in which Western operates and maintains the Nucla Steam Plant for Ute, which is the owner. The witness described the operation, contending it was possible to combine their generating plants with Nucla, resulting in a more efficient operation. The witness states that the cost of operating the Nucla plant as disclosed by their books is 12.5 mills per kilowatt hour which costs Ute $1,475,823.63, for which Ute received in revenue $1,261,122.66, the most to Ute being in excess of revenue received in the amount of $214,699.97. The record and testimony further disclose that Ute has elected to terminate this operating agreement which was subject to a lawsuit before the District Court in Montrose County.

Witness Baudino states Western is ready, willing and able to supply wholesale electric power to adjacent distribution cooperatives who are members of Ute, at a price less than the costs shown at the Nucla Plant; that Western desired this business, and if made available, would secure additional power for sale to take care of same.

In support of Protestants' opposition, several witnesses who were either engineers, accountants, and experts in the electrical industry, identified exhibits and gave testimony. In the main, it is our opinion—and we think the record so discloses—that these witnesses do not agree with the assumptions made by the technical witnesses of Applicant. We cannot say they disagree as to their arithmetical findings but rather with basic assumptions made. If Applicant is wrong and Protestants are right in the assumptions, it would necessarily change the cost of generation, plant and attendant facilities, resulting in an increased cost of power. Protestants, assuming their studies are

correct, contend that Hayden power would cost more than power from the Bureau. Protestants attacked very vigorously Ute's fuel costs and costs of plant.

The protest of Western and Public Service we will summarize as follows:

1. Ute failed to prove public convenience and necessity. Protestants gave testimony in which they contended there is no need nor necessity for the facilities or service to be rendered by Ute. Witnesses further maintained that adequate electrical power was presently available for the immediate future from the Bureau of Reclamation, and if said power proved inadequate in the future that the existing electric generating facilities in Colorado be given an opportunity to supply this deficiency.

2. The construction of Hayden Plant would be detrimental to the investor-owned electric suppliers and their consumers.

3. Protestants vigorously contend that money is not available to Ute and giving as their reason that the law creating and governing the Rural Electrification Administration, a Congressional enactment, does not authorize the type of loan necessitated by this application.

In summarizing Protestants' position, we would say their contention is: Ute's cost figures are too low and not realistic; that there is a serious question as to the availability of satisfactory coal, and that the contract with Peabody is not firm, which will result in higher fuel costs; that under their proposed operation, rates would be discriminatory; that qualified and efficient help for the op-

eration of the plant and distribution system is not available to their operation; that the proposed loan from the Rural Electrification Administration is illegal; and they insist that Ute's Colorado-based distributing cooperatives be restricted by this Commission, to all practical purposes, to its purchase of electrical energy and power to the Bureau's Colorado River Storage Project and from existing investor-owned utilities who operate in Colorado.

The Commission realizes the above applications are very far-reaching and important to the economy of our State, as it not only involves the furnishing of electrical energy for the use of our rural areas but also the conservation of our water resources as well as the protection of our investor-owned electric companies. The Commission recognizes this importance and is of the opinion that these questions deserve our best considered judgment and our determination should not be hastily given. In our consideration, we find 2,536 pages of transcribed record and approximately 100 exhibits. Twenty days were spent taking testimony and listening to the arguments of attorneys, and we wish to point out particularly that the Transcript of the Record was certified to the Commission on December 21st, 1962, at which time the Commission started its deliberations.

At the conclusion of Applicant's presentation, Public Service and Western moved to dismiss the application of Ute. In general, Protestant's motions were based upon failure by Applicant to prove public convenience and necessity.

Public Service also moved to dismiss that portion of

Ute's application insofar as it relates to the alternative transmission lines shown on Exhibit No. 9. Western also joined in this motion. These motions were taken under advisement by the Commission.

FINDINGS

THE COMMISSION FINDS:

That the above Statement be made a part hereof, by reference.

That Colorado-Ute Electric Association, Inc. is a public utility under the Colorado law and subject to the jurisdiction and regulation of this Commission, and the Commission has jurisdiction of the subject matter of the application herein.

That the Commission is fully advised in the premises.

That the motion of Public Service and Western to dismiss the application should be denied.

That the motion of Public Service and Western that the application, insofar as it relates to the alternative transmission lines shown on Exhibit No. 9, should be sustained.

We have carefully reviewed the evidence and the record and have been unable to find sufficient evidence justifying our authorization of the alternative transmission lines or the Shiprock-Bayfield 115 Kv line. Furthermore, it appears to the Commission that Applicant has made no engineering study, no estimates of costs have been de-

termined, and the necessary funds for the construction of the alternative transmission lines were not included in the Rural Electrification Administration loan, Application No. 19156. Testimony suggested the possibility of duplication of facilities for the Shiprock-Bayfield transmission line. We are of the opinion and so recommend, that negotiations and study should be made by Applicant, pertinent, especially, to the alternative transmission line and the Shiprock-Bayfield transmission line, so to avoid unnecessary duplication of facilities, resulting, in our opinion, in possible substantial benefits to the ultimate consumers in Colorado. This, we view as a mandate of our law that the Commission should consider. We do not feel we have sufficient facts and engineering and economic data before us to justify authorization. We therefore are of the opinion that the motion of Public Service and Western, insofar as it relates to the alternative transmission lines shown on Exhibit No. 9, is good as the record now stands, and that portion of the application should be denied. We feel there is a reasonable possibility of duplication of facilities should we authorize construction of the Shiprock-Bayfield transmission line. This does not preclude Applicant from making further filings after they have completed their studies and negotiations, if they so elect.

That Protestants occupy an unusual and peculiar position in these applications as they do not directly sell any power or energy to Ute or its members.

That if Protestants sold power and energy to the Applicant that the cost would be substantially higher than it would be if Applicant purchased power from the Colorado River Storage Project, or if Applicant produced its own

requirements at Hayden. This is brought about by preferential tax treatment and cost of money enjoyed by Ute.

That the Bureau has formally notified Ute and those member cooperatives receiving power from the Western Division of Missouri River Basin that their present source of energy is no longer available. However, the Bureau assures Ute that power and energy will be made available to them as preference customers by Act of Congress, from the Colorado River Storage Project.

That Applicant is now faced with the immediate problem of securing new and additional sources of power and energy. This basic fact is not substantially questioned in the record.

That Ute, the Applicant herein as we interpret the record, has to elect from three sources of power available, to take care of their present and future needs.

1. To purchase power from the investor-owned utilities represented by the Protestants herein;
2. To avail themselves of Bureau Power from the Colorado River Storage Project; and
3. To construct a steam electric plant at Hayden.

Ute, through its Board of Directors, has elected to construct a plant at Hayden. This decision was arrived at after conferences with the Bureau, studies made and the report of an engineering firm retained by them as to its feasibility. The engineering firm found that said plant was feasible, and recommended its construction.

By said election, Ute determined that it was not to

their best interests or the interests of their members to purchase power from the investor-owned utilities for the reason that investor-owned utilities cannot meet the costs of Bureau power or self-generated steam power at Hayden by Ute, due to their unfavorable tax position and of the unavailability to investor-owned utilities of 2% money.

Ute is left with two choices of power requirements, and determined through its Board of Directors that it was not to its best interest or to the best interests of its members to purchase its immediate and future power and electrical energy from the Colorado River Storage Project.

It appears from the record that if Applicant or its members elect to purchase power from the Colorado River Storage Project that Ute must estimate their future needs. Ute, through its engineering firm, and by witnesses from the Bureau of Reclamation, estimated its requirements for the future. After said requirements are determined, Ute finds itself obligated to pay for power, whether they use it or not. No utility or cooperative can accurately foretell how much electricity is going to be required in the future to serve its customers and members. In order for a public utility to properly discharge its utility functions, it must contract for a larger amount of power than it can foresee using, if it were to depend on Colorado River Storage power solely as its principal and primary source of power.

It is therefore obvious that it is to the advantage of all of the Colorado members of Colorado-Ute to combine their requirements and act as a unit. This pooling of power requirements permits the members whose loads may not grow as much as anticipated to protect those utilities whose loads may have grown more than anticipated. It

would not be in the public interest to require these individual members who are likewise preferential customers to contract separately with the Bureau for their power requirements.

Considering the question of whether Ute should be required to purchase its power requirements from the Colorado River Storage Project rather than constructing its own generating plant, there is evidence introduced on behalf of Applicant that indicates that the cost to Ute, from the Colorado River Storage Project, would be substantially higher than the cost of producing its own power and energy requirements at Hayden. The flexibility offered by the plan proposed by Ute is much more advantageous than purchasing power from the storage project. If the loads of Ute grow faster than anticipated, under the Hayden Plant, power and energy is available to the Applicant, and Ute can take exactly what it needs. It cannot do this with Storage Project power. Ute must contract for a firm and definite amount and pay for this amount, whether it needs it or not.

We do not feel that the Commission should assume the burden of speculation on a matter so vital to thousands of consumers when the Colorado-Ute Board has made a management decision to construct the Hayden Plant. We are of the opinion that the validity of Ute's decision is supported by a preponderance of a great amount of diametrically conflicting evidence.

We believe the need for additional power by Ute to serve its members has been established, and we believe that Ute has demonstrated that the construction of the Hayden Plant is the most feasible and satisfactory way to

meet Ute's needs; that such construction will furnish a sound, interconnected system, which, through the participation of Salt River, will enable Ute to construct a larger, more economical plant and base load it from the beginning. We are convinced that the plan proposed by Ute will be advantageous to the consumers of electrical energy who make up Colorado distribution cooperatives and who in turn are the owners of Ute.

The Protestants urge that the loan upon which Ute relies to construct the facilities at Hayden is in clear violation of the Rural Electrification Act. They contend the loan would not be for the purpose of serving rural areas not receiving central station service, it would not be self-liquidating, and would be for the primary benefit of the Colorado River Storage Project. In other words, the Rural Electrification Administration has no authority under their Act to make this loan. We have repeatedly refused to rule on such contentions, and said:

In Re Highlands Utilities Co., Decision No. 21708 (1943)

> "The Commission is of the opinion that it is not for us to determine the right and power of the Administrator of the R.E.A. under the law to make loans to cooperatives."

In our Statement, we said: "This is a joint application by Ute and the Bureau of Reclamation to firm up Colorado River Storage Power."

The Commission, at first, could not understand the reasons for the introduction by Applicant of evidence as

to the beneficial results to the Colorado River Storage Project by the erection of an electric generating plant at Hayden. After reviewing the record, we are impressed with its importance and its effect, not only on the economy of that portion of Colorado within the Colorado River Drainage, but as to its effect upon the entire State of Colorado.

Water is the life-blood of our State, and the future growth of Colorado depends upon available water. Public-spirited men for the past fifty years, looking at Colorado's future, coming from all segments of our economic and political life, have been virtually unanimous in sponsoring, promoting and bringing into being a program to save, impound and store our flood waters for Colorado's future use and growth.

As a result of the work by these men, who, working in conjunction with like men of similar views and aims from other Rocky Mountain States, have interested the Federal Government in building and financing the Colorado River Storage Project.

Harvey McPhail, Executive of the Colorado Consumers Power, Inc., testified that the construction of the Hayden Plant would, when ultimate development occurred, accrue benefits to the Upper Colorado River Basin fund in excess of two hundred million dollars a year.

L. R. Kuiper, Acting Director of the Colorado Conservation Board, testified that the Basin Fund was to be used for the construction of participating projects in the upper basin, and identified 43 projects in Western Colorado that would be built with revenue from the Basin

Fund totaling in cost almost three-quarters of a billion dollars, and stated that anything that enhanced the value or increased the amount of the Basin Fund would assist in accelerating the construction of those projects and benefit the people of Colorado.

Floyd Dominy, Commissioner of the Bureau of Reclamation of the Department of Interior, and Wade Taylor, also of the Bureau, affirmed Mr. McPhail's analysis of the effect of the construction of the Hayden Plant insofar as accruing benefits to the Basin Fund were concerned, although they differed somewhat in the magnitude of these benefits. They confirmed the testimony concerning benefits to the people of Colorado and the Western Slope through the location of a steam plant at Hayden, and that it is important that the application be approved at this time so that maximum benefits could be obtained.

The Commission is of the opinion that the granting of authority to construct the Hayden Plant would materially reduce the initial investment by the United States, would make savings in transmission losses, and would effectuate savings and wheeling charges; all this would accelerate the construction of the participating projects, resulting in benefits to the people of Colorado, and particularly to those residing on the Western Slope.

That the rates to the eleven distribution members is based on cost and the difference in rates is based on the difference in the cost of service to different members. The eleven distribution members are purchasing power on a rate schedule which is subject to modification by this Commission.

That there is a very serious doubt in the mind of the Commission that the legislative intent was to require Ute to obtain a certificate of public convenience and necessity to construct a plant at Hayden to serve its members. While on the other hand, the investor-owned utilities would be permitted to construct comparable plants without Commission approval, we recognize a literal interpretation of our law would indicate Commission approval is necessary. We do not feel, however, that it was the intent of the legislature to give to investor-owned utilities preferential treatment. In other words, we interpret the Act under strict construction to mean that a consumer-owned utility has the right and privilege to select its own source of power, so long as its election is reasonable and prudent, and consistent with the public interest. That, we believe to be the basic right of every utility, be they investor-owned or consumer-owned or municipal.

After a review of the findings heretofore made, it is our opinion, and we so find, that public convenience and necessity require the construction of 150,000 Kw steam turbine electric generating plant near Hayden, Colorado, together with its usual attendant facilities, and the following transmission lines, interconnections, substations, terminal and switching facilities:

(1) Interconnect at 138 Kv and 230 Kv with the substation of the United States Bureau of Reclamation, near Hayden.

(2) The necessary transformation and terminal facilities and the transmission lines of Ute to interconnect with the 69 and 46 Kv circuits of Yampa Valley between Oak Creek and Craig, Colorado,

and terminal and transformation facilities at Oak Creek, Colorado.

(3) 138 Kv transmission line from Hayden to Rifle, Colorado, via Meeker with facilities at Meeker for inter-connection with Moon Lake transmission line from Meeker to Rangely, Colorado.

(4) 115 Kv transmission line from Rifle to Collbran, Colorado, with the necessary terminal and transformation facilities at 115 Kv and 138 Kv, including necessary facilities to connect to a 69 Kv circuit extending from Rifle to Meeker.

(5) A step down substation at Carbondale-Basalt to supply service at 69 Kv.

(6) 69 Kv transmission line from Carbondale-Basalt to Eagle and from Carbondale-Basalt to Aspen with terminal and transformation facilities at each location.

(7) The necessary facilities for the interconnection with the facilities of the United States Bureau of Reclamation at Collbran and to the Morrow Point-Montrose 115 Kv circuit at Montrose, Colorado.

(8) The necessary facilities for transformation and interconnection with the Bureau of Reclamation to supply Gunnison County Electric Association.

That the facilities sought to be authorized herein should be limited to the interconnections as specified and for the supply of service to the members set forth in the Statement.

We further find that the building of the above-de-

scribed generating plant, interconnection facilities, substations, transmission and terminal facilities, are in the public interest.

THE COMMISSION FURTHER FINDS:

That the issuance of mortgage note to the United States of America for the aggregate amount of $22,876,000 and the execution of a mortgage or mortgages to secure said notes, and the execution of amendments dated as of December 12, 1961 and of March 1, 1962, to the loan contract between the Applicant and the United States of America, dated as of May 25, 1955, as amended, are not inconsistent with the public interest or with provisions of the law governing such transactions, and should be authorized and approved.

ORDER

THE COMMISSION ORDERS:

That public convenience and necessity require the construction of a 150,000 Kw steam electric generating plant near Hayden, Colorado, together with its usual attendant facilities and the following transmission lines, interconnections, substations, terminal and switching facilities:

(1) Interconnect at 138 Kv and 230 Kv with the substation of the United States Bureau of Reclamation, near Hayden.

(2) The necessary transformation, terminal facilities and transmission lines for Ute to interconnect with 69 and 46 Kv circuits of Yampa Valley between Oak Creek and Craig, Colorado, and termi-

nal and transformation facilities at Oak Creek, Colorado.

(3) 138 Kv transmission line from Hayden to Rifle, Colorado, via Meeker, with facilities at Meeker for interconnection with Moon Lake transmission line extending from Meeker to Rangely, Colorado.

(4) 115 Kv transmission line from Rifle to Collbran, Colorado, with the necessary terminal and transformation facilities at 115 and 138 Kv and also facilities necessary to connect to a 69 Kv circuit extending from Rifle to Meeker.

(5) A step down substation at Carbondale-Basalt to supply service at 69 Kv.

(6) 69 Kv transmission line from Carbondale-Basalt to Eagle and from Carbondale-Basalt to Aspen with terminal and transformation facilities at each location.

(7) The necessary facilities for the interconnection with the facilities of the United States Bureau of Reclamation at Collbran and to the Morrow Point-Montrose 115 Kv circuit at Montrose, Colorado.

(8) The necessary facilities for transformation and interconnection with the Bureau of Reclamation to supply Gunnison County Electric Association.

That the facilities certified herein are limited to the interconnections as specified and for the supply of service only to its members heretofore set forth in the Statement.

That any facilities sought by Applicant not specifically recited above are hereby denied.

This Order shall be taken, deemed and held to be a certificate of public convenience and necessity therefor.

That the issuance of the mortgage note or notes to the United States of America for the aggregate amount of $22,876,000, and the execution of a mortgage or mortgages to secure said notes, and the execution of amendments dated as of December 12, 1961 and as of March 1st, 1962, to the loan contract between the Applicant and the United States of America dated as of May 25, 1955, as amended, be, and are hereby, authorized and approved.

That within one hundred and twenty (120) days of the final execution of the mortgage note or notes for the aggregate amount of $22,876,000 to the United States of America authorized herein, and of the mortgage or mortgages to secure said notes, Applicant shall file with this Commission one conformed, executed copy thereof.

That nothing herein contained shall be construed to imply any recommendation or guaranty of, or any obligation with respect to, said securities on the part of the State of Colorado.

That the Commission retains jurisdiction of this proceeding to the end that it may make such further Order or Orders in the premises as to it may seem to be proper and desirable.

This Order shall become effective twenty-one (21) days from date.

RALPH C. HORTON
Commissioner

Dated at Denver, Colorado,
this 21st day of February, 1963.

ea
(SEAL)

ATTEST: A TRUE COPY

J. J. MAHONEY
Secretary

CONCURRING OPINION BY COMMISSIONER HOWARD S. BJELLAND:

Except as otherwise stated herein, I concur in the opinion of Commissioner Horton, which opinion thereby becomes the majority opinion and decision of this Commission. However, as we have arrived at identical end results, but by different routes, it becomes necessary for me to briefly set forth my views in this matter by a separate concurring opinion.

The criterion to be applied in determining whether or not the Ute application should be granted is clearly set forth in 1953 CRS 115-5-1, namely, "that the present or future public convenience and necessity require or will require such construction." In my opinion, the word "public" as used in this statute and as applied in the instant case refers not to the entire population of the United States, nor to the entire population of the State of Colorado, but rather to that portion of the public which will be served by the proposed plant,—namely, the 40,000 or so Colorado farm families who now purchase electricity from the rural electric cooperatives which Ute plans to serve.

Having determined the specific segment of the public

whose convenience and necessity must be served, it is now possible to eliminate from primary consideration irrelevant factors, thereby narrowing the specific issues before the Commission.

Colorado River Storage Project Benefits. It is clear that the construction of the Hayden Plant will benefit the Colorado River Storage Project by allowing substantial savings to be made in construction of Bureau of Reclamation transmission lines as well as further savings in the curtailment of transmission losses. Further benefits will accrue to the said project by the availability of steam generation to firm-up the hydro-electric generation. The total amount of such benefits may be well in the neighborhood of $200,000,000. These benefits will make funds available at a substantially faster rate for the construction of participating irrigation projects in the Upper Division (Colorado, Utah, Wyoming, and New Mexico) States. Approximately one-half of these projects will be built in the State of Colorado. If the Bureau of Reclamation were seeking a certificate of convenience and necessity to build the Hayden Plant before an Upper Division States Public Utilities Commission, there would be no question but what the certificate should be issued. It may well be, as has been inferred in this case, that Ute is in effect, the "chosen instrumentality" of the Bureau of Reclamation to build a plant which the Bureau itself has not been authorized to build by Congress. Even if this should be the fact, it has no bearing in the instant case. The benefits which will accrue to the Colorado River Storage Project by construction of the Hayden Plant are simply incidental benefits, not directly related to the convenience and necessity of the 40,000 Colorado farm families which Ute plans to serve from the Hayden Plant.

The application of Ute must stand or fall on its own merits. The testimony introduced by Ute indicates that its over-all costs of power, including power from the proposed Hayden Plant, over a ten year period, would be 8.01 mills per kilowatt hour, as contrasted to 9.58 mills if Colorado River project power were utilized. The benefits which would accrue to the Colorado River Storage Project, if the Hayden Plant is built, would remain the same if the cost of power to Ute from the Hayden Plant over this ten year period should be 18.01 mills rather than 8.01 mills. Yet if this were the case, certainly no one would contend that it would serve the convenience and necessity of Ute's consumers to build the Hayden Plant. It is obvious that Ute must establish to the satisfaction of the Commission that the convenience and necessity of the 40,000 Colorado farm families it plans to serve will be better served by the construction of the Hayden Plant than by utilizing power from other sources.

Hayden Community Benefits. The community of Hayden, where the proposed plant would be located, would benefit economically if the Hayden Plant is built, as to a lesser degree, would the County of Routt, the entire general area, and the State of Colorado. As has been said, one of the end results of constructing the Hayden Plant would be to sell Colorado coal to Arizona in the form of electric energy. Additional tax base would be available to the area. A substantial payroll would benefit the merchants. The Town of Hayden would grow. These benefits, however, are also incidental, and the same logic applies as that applicable to Colorado River Storage Project benefits. Any community would benefit from the construction of a new plant in its area. The fact that the Hayden com-

munity would benefit from the construction of the Hayden Plant is not directly relevant in this proceeding.

Public Power. The Congress of the United States has authorized the Colorado River Storage Project and has appropriated funds for construction purposes. Such Congress has also provided that rural electric cooperatives may borrow money from the federal government at an interest rate of two percent, shall have certain income tax advantages, and shall have preferential treatment in the allocation of hydro-electric power from public projects. The Legislature of the State of Colorado has provided by law that rural electric cooperatives shall be utilities and subject to the jurisdiction of this Commission. The Public Utilities Commission of the State of Colorado is not a proper forum before which to debate the merits of private power or public power. The fact that Ute has certain income tax advantages and can borrow money from the Rural Electrification Administration at two percent is relevant only in determining the economic feasibility of the Hayden Plant. The philosophy upon which preferential treatment of rural electric cooperatives is based is properly argued only before legislative forums. Certainly, it is not the function of a public utilities commission to contravene legislative policy by refusing to consider the advantages accorded rural electric cooperatives by such preferential treatment.

Validity of Ute REA Loan. Protestants have contended in this proceeding that the Rural Electrification Administration cannot legally make the proposed loan to Ute necessary to finance the construction of the Hayden Plant. Even assuming that this contention has legal merit, it is not relevant in the present proceeding. If the Rural

Electrification Administration refuses to make the loan, obviously Ute cannot build the Hayden Plant. If the Rural Electrification Administration makes the loan, Ute will be financially able to so do. If the loan is not legal, the Rural Electrification Administration might have some difficulty in enforcing the terms of the loan or in collecting. But this is not a problem of the Applicant or of the Commission. To reverse the situation, suppose a local bank intended to purchase an issue of Protestants' bonds, would it then be contended that it would be incumbent on this Commission to determine if such local bank had the legal authority to purchase such bonds. I think not. It is to be noted that the Rural Electrification Administration is not a party to the present proceedings, and the legality of the acts of such agency should not be determined on an ex parte basis. If a question exists as to the legality of the loan which the Rural Electrification Administration proposes to make to Ute for the construction of the Hayden Plant, the Public Utilities Commission of the State of Colorado is not the proper tribunal before which such question should be litigated.

Detriment to Protestants. Generally speaking, the private utilities in the State of Colorado primarily serve urban areas and incidentally serve rural areas adjacent to or lying between urban areas. Contrariwise, rural electric associations primarily serve rural areas and incidentally serve small urban areas which happen to be located within the rural areas. The private utilities serve the bulk of the people in the State, whereas the rural electric cooperatives serve the bulk of the area. The service areas of each are relatively clearly defined, although there appears to be a minor amount of over-lapping. The Protestants herein will not lose any of their present customers as the result

of the construction of the Hayden Plant. It is quite possible that the Protestants may lose some federal installation customers in the event such federal installations elect to purchase power as preference customers from the Colorado River Storage Project. Such loss, however, is not attributable to the construction of the Hayden Plant.

If power from the Hayden Plant were to be used to invade the certified area of private utilities, the position of Protestants that they would be detrimentally affected would be sound. This, however, is not the case. Power from the Hayden Plant will be used to serve consumers who are not now customers of private utilities. The regulatory power of the Commission will insure that the position of private utilities in their certified areas of service will not be adversely affected.

The real detriment of which Protestants complain is in actuality the growth of the system of rural electric cooperatives. As hereinbefore stated, this is a question of philosophy for consideration by the legislative branches of government, and not a question for consideration by the Public Utilities Commission, except generally where a direct conflict may exist in certified areas, or areas to be certified. The alleged detriment to Protestants is not directly relevant on the question to be determined in this proceeding. The construction of the Hayden Plant by Ute will not result in an adverse or detrimental effect upon Protestants.

Public Convenience and Necessity

The basic question to be decided by this Commission is whether or not the public convenience and necessity of

the 40,000 farm families to be supplied by Ute will be served by the construction of the Hayden Plant.

The first element that must be established is the need for the proposed service. Ute has established the fact that it now needs and will need in the future additional amounts of electrical energy. The entire record basically supports the finding that Ute needs more power.

The second element which must be established is that the proposed service by Ute will meet this need. Ute has three sources from which additional power can be obtained, namely, private utilities, the Colorado River Storage Project, or new generation facilities. Ute must satisfy the Commission that its election to build new facilities, namely the Hayden Plant, is proper. There is no justification for requiring Ute to purchase power from private utilities. Testimony introduced by the private utilities established the fact that they were not in a position to compete on a cost-of-power basis with a plant built with two percent money and operated by an organization with certain alleged income tax advantages. Even were this not the case, it would appear unwise to refuse to allow one utility to build generation facilities on the ground that another utility is willing to, in effect, provide generation facilities for the other. Certainly, it would not be argued before this Commission that the fact that Ute might be willing to build generation facilities to serve Protestants' needs would preclude Protestants from constructing their own generation facilities. Even as the record clearly establishes the fact that Ute needs more power, it equally clearly establishes that Ute's immediate needs and reasonable future needs can be satisfied by purchasing hydroelectric power from the Colorado River Project. Ute and

its member cooperatives are preference customers for power from this project, and preference power for the Upper Division States will in all likelihood not be fully utilized until the mid 1970's. This source of power is stable and the price is reasonable. Ute, however, has established by a preponderance of the evidence introduced in this cause, that the total cost of all power to Ute, assuming additional needed amounts are supplied from the Hayden Plant, is substantially less than the total cost of all power to Ute, assuming additional needed amounts of power are supplied from the Colorado River Storage Project. In brief, Ute has established that the proposed Hayden Plant is the cheapest source of supply, and that procurement of power from such plant will satisfy, and is the best method of satisfying, the established need.

A third element which Ute must establish is its ability to render the proposed service. Ute has established that through loans from the Rural Electrification Administration and prepayment from Salt River, it will have adequate funds available to construct the proposed plant. Ute should have little difficulty in obtaining proper personnel to operate the plant. Ute is qualified and able to render the proposed service.

To summarize, Ute has established by a preponderance of the evidence that the convenience and necessity of the 40,000 Colorado farm families Ute plans to serve require that the Hayden Plant be constructed.

It is to be noted in passing that Ute's proposal to build the Hayden Plant would not be economically feasible were it not for the availability of the two percent loan money from the Rural Electrification Administration. The

funds of such administration, of course, come from the federal government. It is presently costing the federal government a little over 4% to borrow money. The federal government will lose approximately $1,000,000 a year on the Ute loan simply because the government is paying 4% to borrow the money which it loans to Ute at 2%. Ute introduced an exhibit showing that over a ten year period, it would enhance its net cash surplus by approximately $1,000,000 a year, if it is allowed to construct the Hayden Plant. The profit to Ute is balanced by the loss to the government. If Ute were required to pay the going rate of interest paid by the federal government, the savings which Ute will make by constructing the Hayden Plant would be completely wiped out.

It is further to be noted that the effect of the building of the Hayden Plant by Ute will be to deprive Ute and its member Colorado distribution cooperatives of their preference right to purchase power from the Colorado River Storage Project. They will have elected to so do, or in the words of a witness from the Bureau of Reclamation, they will have done so "by their own action."

One further point remains to be discussed. The ten Colorado distribution cooperatives, who have become members of Ute, have also entered into 40-year full supply wholesale power contracts with Ute, wherein each of these distribution cooperatives has agreed for this 40-year period to purchase its entire supply of electricity exclusively from Ute at a price which shall be sufficient "with the revenues of the Seller from all other sources, to meet the cost of the operation and maintenance (including without limitation, replacements, insurance, taxes and administration and general overhead expenses) of the generating

plant, transmission system and related facilities of the Seller, the cost of any power and energy purchased for resale hereunder by the Seller, the cost of transmission service, make payments on account of principal of and interest on all indebtedness of the Seller, and to provide for the establishment and maintenance of reasonable reserves." Such contracts purport to very effectively guarantee Ute against operation at a loss. The Legislature of the State of Colorado has placed rural electric cooperatives under the jurisdiction of this Commission by declaring such cooperatives "to be affected with a public interest and to be a public utility." A public utility may not contract away the regulatory power to determine rates to ultimate consumers. The Commission will not be bound by these contracts in rate proceedings.

HOWARD S. BJELLAND
Commissioner

Dated at Denver, Colorado
this 21st day of February, 1963.

mls

(SEAL)

ATTEST: A TRUE COPY

J. J. MAHONEY, Secretary

DISSENT

I dissent.

This decision of the Commission is of such far reaching effect that I feel I should express my reasons at some

length, even at the risk of possible criticism for repeating matters mentioned by the majority.

The Applicant will be referred to as "Colorado-Ute," the Protestants, The Western Colorado Power Company and Public Service Company of Colorado, as "Western," and "Public Service," and the proposed generating plant as the "Hayden Plant."

The Applicant is an electric cooperative association under the laws of Colorado and also is a rural electric association. Public Service and Western are private utility corporations. All three are public utilities under the law and are subject to the jurisdiction of, and regulation by, this Commission.

The Applicant has filed Application No. 19098 requesting a certificate of public convenience and necessity to construct (a) a new steam turbine electric generating plant near Hayden, Colorado, with a nominal rating of 150,000 Kilowatts, designed for firing with pulverized coal, together with the usual attendant facilities, and (b) transmission lines, substations, terminals, and switching facilities, and other facilities necessarily incidental to the transmission of electric power and energy to be generated at such plant, intending where, and when feasible to use circuits and transmission facilities of the Bureau of Reclamation, of Public Service, and of others.

It proposes to generate such electric power and energy "for sale to its members," to-wit: San Miguel Power Association, Inc., Empire Electric Association, Inc., La Plata Electric Association, Inc., Delta-Montrose Rural Power Lines Association, San Luis Valley Rural Electric

Cooperative, Inc., the Grand Valley Rural Power Lines, Inc., Holy Cross Electric Association, Inc., White River Electric Association, Yampa Valley Electric Association, Inc., Gunnison County Electric Association, Inc., another G. & T. Cooperative - Arkansas Valley G. & T. Inc., all of Colorado; Bridger Valley Electric Association, Inc., of Wyoming, and the Salt River Project Agricultural Improvement and Power District of Arizona. Arkansas Valley G. & T., Inc., operates in Colorado, and has three distributing members, to-wit: "San Isabel," "Southeast," and "Sangre de Cristo." The Colorado members are rural coops. Salt River Project Agricultural Improvement and Power District is an agricultural improvement district, organized under the laws of Arizona, herein referred to as "Salt River" or "District." The District owns and operates an electric system in the central part of Arizona in conjunction with its operation of the Salt River Reclamation Project and serves over 100,000 customers with electricity in Arizona.

The estimated cost of the site, generating plant, transmission substations, transmission lines, and switching facilities is approximately $30,500,000.00.

50,000 kilowatts of the 150,000 kilowatts capacity proposed to be initially constructed are presently allocated, and will be furnished to, Salt River, 50,000 kilowatts are to be used by Colorado-Ute's remaining members, and the remaining 50,000 kilowatts will initially be absorbed by Salt River. Colorado-Ute will have the right to draw on the 100,000 kws allocated to Salt River from time to time and re-allocate this to its members, it being contemplated that sometime in the future the full 150,000 kws will be used by the members of Colorado-Ute, excluding Salt

River. At the present time, Colorado-Ute has available 75,070 kws of capacity. It plans to retire 24,070 kws of this capacity because of alleged obsolescence, high operating costs, and contractual obligations, leaving to it an available capacity of 51,000 kws. Why this retirement is necessary, or even reasonable, is not made clear in the record. The obsolescence, the high operating costs, and the contractual obligations are alluded to but not satisfactorily explained. The total need as of 1960 (there being no later figures) for all coops to be served and excluding Salt River amounts to 72,951 kws, leaving a net need of 21,951 kws to be provided. Colorado-Ute at present has an application pending with the U. S. B. R., as a "preference customer" for 10,000 kws, later to be increased to 16,000 kws, which would leave initially 11,951 kws to be acquired, if the retirement is necessary, and effected. This need should be contrasted with the proposed immediate construction of a 150,000 kw plant, to be followed by construction of an additional 150,000 kw capacity, with an ultimate contemplated total capacity of 600,000 kws. The need for standby capacity for 12,650 kws is recognized but it is anticipated this can be worked out with the Bureau.

The Applicant has also filed a Petition, Application No. 19156, with the Commission, applying for an Order authorizing a proposed issue, assumption, or guaranty of securities, which proposed securities transaction will be with the Rural Electrification Administration, a branch of the Federal Government, involving execution of a note or notes payable to the United States of America, and a mortgage or mortgages to secure said notes, in an amount not in excess of $22,876,000.00 which, together with funds to be provided by Salt River Project, would be used

for the construction heretofore mentioned. Salt River, it is proposed, will advance toward said construction the sum of $8,610,000.00, which will be substantially in the nature of a prepayment for the 50,000 kw of capacity to be furnished by Ute to Salt River. These two sources of funds are the sole means whereby the construction is to be completed. *Colorado-Ute and its Colorado members will have no equity in the enterprise.*

Both applications were consolidated for hearing.

On November 2, 1959, Colorado-Ute completed the construction of, and placed into service, a steam electric generating plant at Nucla, Colorado, and certain transmission lines and substation facilities. That plant consists of three generating units, each having a capability of 12,650 kws giving it a combined or total capability of approximately 38,000 kws. At the time of the construction of that plant, Colorado-Ute served only four distribution rural electric cooperatives which were La Plata Electric Association, with headquarters at Durango, Empire Electric Association, with headquarters at Cortez, San Miguel Power Association, with headquarters at Nucla, and Delta-Montrose Rural Power Lines, with headquarters at Delta. Subsequently, Colorado-Ute entered into a contract to render wholesale electric service to Grand Valley Rural Power Lines with headquarters at Grand Junction, Colorado. At this time, only the above-referred to four original distribution cooperatives are receiving service from Colorado-Ute. Service to Grand Valley Rural Power Lines and the legality of construction of certain transmission lines by Colorado-Ute to render such service is the issue of a complaint now pending before this Commission.

Both Public Service and Western have been rendering electric service in Colorado since long prior to the time Colorado-Ute was first incorporated or ever constructed any generation and transmission facilities. Western serves in southwestern Colorado in the general area from Durango to Montrose, Colorado, and Public Service serves in a large area of the eastern slope of Colorado, including Denver, as well as in portions of Western Colorado such as the San Luis Valley, Grand Junction, Rifle, etc. The record discloses that Public Service has been rendering such service through predecessor corporations since at least as early as the turn of the last century and had major power plants in operation as early as 1907, at which time it constructed a major transmission line from Shoshone Hydro plant near Glenwood Springs, Colorado, to the Denver area, thereby interconnecting its western slope operation with its power plants on the eastern slope. Western has likewise been engaged in the general electric public utility business since prior to the turn of the century and was instrumental in developing high voltage transmission lines which it utilized in serving the mining industry in the Ouray, Telluride, Silverton area in the early days of the history of Colorado.

Although, as previously noted, Applicant now renders wholesale electric service to four local distributing REA's, it now proposes, by virtue of its application, to expand its operations and serve in all thirteen organizations which are located in various areas throughout most of the State of Colorado, in addition to certain areas in Arizona, Wyoming and Utah.

Applicant proposes, if this application is granted, to supply the total electric requirements of all of the above-

referred to rural electric cooperatives and a portion of the requirements of the Salt River Project in Arizona. Each of these prospective new customers of Applicant is now receiving service from some other source.

Under the law:

> "115-5-1. New construction—extension. (1) No public utility shall begin the construction of a new facility, plant, or system, or of any extension of its facility, plant, or system, without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction. . . . "

Certain exceptions are made in the law but they are not applicable, nor is it contended that they are.

The paramount questions, therefore, before the Commission are:

Do the *present* public convenience and necessity require the construction of the Hayden Plant and facilities at the location and for the purposes indicated?

Do the *future* public convenience and necessity require the construction of the Hayden Plant and facilities at the location and for the purposes indicated?

Will the granting of the certificate for such construction be in, or contrary to, the public interest?

In a proceeding involving, as this one does, many complicated and technical facts, and voluminous testimony and evidence, it is only natural that many other and re-

lated questions present themselves; however, the questions above set out represent the basic issues involved, and the determination of such questions afford the basis upon which ultimate decision is rendered, and, these questions necessarily turn upon the *facts* presented to, and the record made, before the Commission.

A vast amount of conflicting testimony and evidence is presented to the Commission, a large portion of which consists of expert testimony;—however, it appears that the "experts" of Protestants have a background founded upon years of actual experience, rather than educated theory.

It is obvious that the objective of the statute is to avoid duplication of sources of power in the public interest. Why should the consuming public pay for, and maintain, two sources of power if one will do, or 3 sources of power if 2 will do, etc., etc.? The law, therefore, subjects proposals for new, or expanded, construction to the judgment of the Commission and in such cases the Applicant must make an affirmative showing that the purpose of the statute will not be defeated.

In this proceeding, the Protestants have actually served in the capacity of investigators, and as informants to the Commission, providing information and evidence which might not have been called to the Commission's attention, and in this capacity they have been useful. They may have other contentions.

It is incumbent upon the Applicant "to tip the scales" in the direction that duplication will not result from its proposed action. In doing this it must show that there is

a need for the additional construction which necessarily involves showing that the existing sources are, and will, not be reasonably adequate and available.

Some forty-odd thousand families in Colorado are being presently served by the Colorado distributing members of the Applicant and have been so served in the past. These consumers of electric power and energy are located in certain, more or less, well defined geographical areas within the State and the power and electric energy used by them has been, and presently is being, obtained from certain and definite sources,—some by their own generating and, some from the United States Bureau of Reclamation. Such power and electric energy is being transmitted to them by means of certain and definite circuit and transmission facilities at the present time in existence and used by such utilities.

Colorado-Ute's sources of power are, to-wit, the Nucla Plant, being its own steam generating plant, and the Collbran-Molina plant, of the U. S. B. R. Its Nucla plant is actually being operated for it by Western under contract.

Of great significance is the fact that some of the Colorado members of Colorado-Ute are "preference customers," and the others are entitled to be "preference customers," of the Bureau. As *preference customers* they enjoy a unique right and privilege in that their needs must first be served by the Bureau before the Bureau's power and energy can be offered for sale to others. This right and privilege is granted by the Federal Government, and it appears from the record that upon proper action by these rural coop utilities they have these rights, may

have these rights, and may by diligent action on their part continue to have them. Colorado-Ute is also a preference customer and is exercising its rights and privileges as such, and may continue to do so by diligent action on its part. Loss of this unique and valuable status can and will result only from negligence, or even deliberate forfeiture.

Under Applicant's proposal the distributing members of Colorado-Ute will be bound by 40 year contracts to purchase all of their requirements from Colorado-Ute at a rate based at a level anticipated to be greater than actual cost, it being contemplated that if the actual cost should eventually turn out to be less, then and in such event, the excess of payments over costs would be credited to the coop members of Colorado-Ute, who, in turn, would recalculate their costs, and any savings, at some indefinite date in the future, will be passed on to the consumers after deductions which now remain unknown, and have not even been approximated. The tortuous route which these anticipated savings must follow is indicated by the following excerpts from Colorado-Ute's By-Laws.

Article VIII of Colorado-Ute's By-Laws provides:

ARTICLE VIII
REVENUES AND RECEIPTS

"Subject to the provisions of any mortgage or deed of trust given or assigned by the Cooperative, the board of directors shall, after the expiration of each fiscal year and after paying or making provisions for the payment of all obligations and expenses of the Cooperative properly chargeable against its revenues and receipts for such fiscal year, apply the unexpended revenues and receipts for such fiscal year:

"First: To the establishment and maintenance of a general reserve fund for working capital to provide, among other things, for insurance, taxes, maintenance, improvements, new construction and contingencies in an amount which the board of directors shall deem reasonable; and

"Second: To the establishment and maintenance of a reserve for the payments of interest on and principal of all outstanding notes, bonds or other evidences of indebtedness issued, or the payment of which shall have been assumed, by the Cooperative in an amount which shall not be less than an amount equal to the total of the interest and principal payments required to be made during the next following calendar year in respect of such notes, bonds or other evidences of indebtedness.

. . . . . .

"(a) To establishment and maintenance of a reserve fund to be used for education in cooperation and in the effective use of electricity;

"(b) Distribution among the members in proportion to their patronage during the fiscal year in which such revenues and receipts were received; provided, however, that any sum available for distribution to a member as aforesaid shall be first applied against any member's indebtedness, if any, to the Cooperative."

The paramount obligation of the Public Utilities Commission is to protect the consumer public. By law it is charged with the duty to regulate public utilities to the

end that the public will be provided with its needs at reasonably economical rates, and at the same time be assured of continuing and adequate sources of supply. In this instance, it is the welfare of these "some forty-odd thousand" families which comes first and which it is the Commission's duty to protect. Applicant contends savings in the amount of $13,000,000.00 will result over a period of 10 years from the proposed construction. The record, however, is silent as to what savings will eventually find their way into the pockets of these families. It is disappointing that no attempt is made, even if only by way of a projection, to indicate to the Commission what the approximate *amount* of these hoped for savings will be to these families on their monthly bills, or approximately when these savings might be realized. The theory, and it is only a theory, is that great savings will be made in the cost of production and that these savings will eventually, and somehow, find their way to the consumers. The details are absent. Many and serious problems are raised. Will the project bring benefits to some, and detriments to others and, if so, to whom, and in what proportion; will the many be made to suffer for the few, or vice versa; will the industrial users save more than the residential users; will the consumers who will need additional transmission facilities, or other facilities, because of location, or load factor, participate in the savings, and to what degree, if at all; how will the facilities of those who have them, which will be retired, be taken into account? On the evidence, it is impossible for the Commission to determine that undue discrimination as between the distributing coops, and, in particular, as between the ultimate consumers, will not occur—or, going a step further, can be avoided *even by regulation.* The power to regulate does not endow the Commission with the power to overcome physical facts,

such as location of consumers, with respect to location of plants. For instance, Gunnison REA, because of its unique location, would be able to obtain its power supply from the Bureau at less cost than from Colorado-Ute, there being no transmission costs involved such as fixed charges on transmission line, operating and maintenance costs, and line losses. Silence in the record precludes the Commission from considered action with regard to the alleged savings.

With regard to the savings themselves grave doubt exists. The availability of coal at the base contract price upon which the savings are based is questionable. The coal contract itself is so filled with escalation provisions, and provisions concerning future eventualities which must be *mutually* agreed upon and decided, or left to arbitration,—all couched in language subject to various interpretations, that the base cost is far removed from being a *firm* cost. In fact, it might be said that the contract almost lacks the "meeting of the minds" essential to contractual obligation. Furthermore, as to the mineability of the coal itself at the base price, the Applicant objected to introduction of its drill hole logs on the ground, among others, that the information was confidential as between itself and the owners of the coal lands, and was sustained by the Commission. The exclusion of this evidence at the insistence of the Applicant leaves obscure in the record pertinent factual information bearing upon the feasibility of mining the coal at the figure used for its calculations. Applicant counters that Peabody Coal Company is under contract and that *that* suffices. But what is the alternative? Should Peabody be faced with deficit operation is Colorado-Ute to take over and operate on a more eco-

nomical basis?—or is the cost of fuel to be increased?—or is Colorado-Ute to transfer its purchase of fuel elsewhere? I feel the only practical alternative will necessarily be, that the cost of fuel will be increased.

With further allusion to the doubt concerning the savings, the Commission should take official notice of the 1961 Annual Report filed by Colorado-Ute, required by law, and of a late filed Colorado-Ute exhibit in Application No. 19477, which show a continuing deficit operation on the part of Colorado-Ute, which by November 30, 1962, reached a total operating margin deficit of $634,066.00. This past sad performance of Colorado-Ute with a 38,000 kw plant suggests doubt as to its future performance with a plant of approximately 4 times greater capacity.

Exhibit 9 introduced by Applicant is a map which purports to show some of the major transmission lines of the parties to this action and the Bureau of Reclamation, and the lines proposed by Colorado-Ute. Some of these transmission lines are designated as "alternate" lines. Such proposed "alternate" lines extend from a point near Salida, Colorado, due south to a point near Monte Vista, Colorado, and from Rifle, Colorado, to Aspen and Eagle, Colorado. The proposed transmission line extending from Salida would be constructed as a 115-kv line to render service to San Luis Valley Rural Electric Cooperative, Inc., and the line extending from Rifle would be constructed as a 69/115-kv line to render service to Holy Cross Electric Association, Inc.

It is apparent from said Exhibit 9 that these proposed "alternate" lines would, if constructed, duplicate existing transmission lines of Public Service. Moreover, it does

not appear that even Applicant seriously contended that public convenience and necessity required the construction of these lines for it introduced no evidence with respect to them upon which this Commission could grant a certificate. It was admitted by Applicant's engineering witness that the lines had not been engineered, that costs had not been determined, and that funds necessary for their construction were not included within the proposed borrowing from REA which is now before the Commission. The evidence in the record with respect to these lines is insufficient to support a certificate of public convenience and necessity.

The real issue is the issue of the need and necessity for the proposed plant and related facilities. As earlier indicated, Colorado-Ute now serves four distribution cooperatives. Its facilities to render such service having been constructed prior to the time of the new amendment to 115-1-3, CRS 1953. The question of whether Applicant was required to obtain a certificate of public convenience and necessity prior to constructing facilities to serve Grand Valley Rural Power Lines, Inc., is one of the issues pending in another proceeding before this Commission. The remaining proposed customers, therefore, should be considered by the Commission in evaluating Colorado-Ute's application for a certificate of public convenience and necessity as to new customers. In connection therewith, it is appropriate to set forth a brief resume of the history of service to these proposed new customers, with the exception of Salt River project and Bridger Valley, in order to fully understand the factual matters involved in this proceeding. Since Salt River and Bridger Valley do not serve any customers in the State of Colorado and are

not subject to the jurisdiction of this Commission, there is no need to discuss present sources of supply available to them inasmuch as it is the duty of the Commission to regulate Colorado utilities and protect Colorado consumers rather than those located in foreign states.

All of the remaining proposed new customers of Colorado-Ute with the exception of Arkansas Valley G. & T., Inc. are presently receiving wholesale electric service from the Bureau of Reclamation, although certain of these local cooperatives also have some generating facilities. In many instances, these distribution cooperatives receive power and energy directly from lines of the Bureau of Reclamation and in other instances such power and energy is transmitted or wheeled to them over lines of Public Service.

As is indicated by the Rural Electrification Act, REA cooperatives were originally organized for the purpose of supplying electricity in rural areas where central station electric service was not then available. This Act of Congress was passed in 1936 and by the early 1940s most of the rural electric cooperatives in Colorado had commenced operations. Some of the proposed new customers of Colorado-Ute were originally rendered wholesale electric service by Public Service, such as Holy Cross, Grand Valley, San Luis Valley and Sangre de Cristo, a member of Arkansas Valley G. & T. Many of the Reclamation laws and acts authorizing construction of power facilities by the United States grant a preference to REA cooperatives in purchasing electric power and energy generated by the United States. This preference gives those cooperatives and certain other non-profit organizations the first call upon such power. Upon the completion of the Big Thomp-

son Project by the Bureau of Reclamation in approximately the year 1951, cooperatives took advantage of this preference right and commenced purchasing power and energy from the Bureau of Reclamation and have continued doing so up to the present time. Such power is actually delivered to some of these cooperatives over lines of Public Service.

Colorado-Ute contends that its customers can no longer rely upon either the Bureau of Reclamation or their own generating facilities to supply their future requirements because of the tremendous load growth which they are experiencing. There is no doubt but that REA cooperatives in the State of Colorado have realized continued load growth in past years and can be expected to grow in the future; however, according to U. S. Census population reports, the following communities had populations for the years as hereafter indicated and were served by members of Colorado-Ute as indicated, to-wit:

COMMUNITY	SERVED BY	POPULATION		
		1940	1950	1960
Pagosa Springs	La Plata REA	1591	1379	1374
Cortez	Empire REA	1778	2680	6764
Meeker	White River REA	1399	1658	1655
Steamboat Springs	Yampa Valley REA	1613	1913	1843
Craig	Yampa Valley REA	2123	3080	2913

Certainly, faced with the foregoing statistics, additional and grave doubt appear as to the accuracy of the degree of future load growth asserted by the Applicant.

Much controversy arose during the proceeding as to the amount and the time of availability of additional power by the Bureau of Reclamation. It is conceded that if the Bureau of Reclamation were *never* to construct additional generating capacity in connection with its reclamation projects, the distribution REA cooperatives would sometime have to look to other sources to meet their increased requirements in the future. The record, however, stands undisputed that the Bureau of Reclamation is now in the process of constructing substantial new generating capacity, that these very same REA cooperatives have a *preferential right* to a portion of the output therefrom, and that the Bureau of Reclamation is even now engaged in receiving applications from such cooperatives for an allocation of this additional power. A major portion of the additional power to be made available by the Bureau of Reclamation will come from what is known as the Colorado River Storage Project. This project will require the construction of large hydro electric plants at Glen Canyon in Arizona, Flaming Gorge in Utah, and Curecanti near Gunnison, Colorado. This project of the Bureau will be interconnected with the existing Big Thompson Project and other similar Reclamation projects in the Missouri Valley Basin, and as a result, *additional* Bureau power could be delivered to Colorado REA cooperatives in much the same manner and by the same facilities as power is currently delivered from the Big Thompson Project.

Mr. Floyd Dominy, Commissioner of Bureau of Reclamation, and Mr. Wade Taylor, Chief of the Division of Power operations and general engineering of the Bureau, testified during the hearings, that for the purposes of marketing power from Colorado River Storage Project,

the areas entitled to such power had been divided into what is known as the Northern Division and the Southern Division. Mr. Dominy's testimony, Mr. Taylor's testimony, as well as Exhibit 105, all conclusively establish that the Northern Division, comprising the States of Colorado, Wyoming, Utah and New Mexico, are entitled to 93% of all power in the winter and 80% of all power in the summer, with the Southern Division, consisting of Arizona and portions of California and Nevada, being entitled to the balance. It is further undisputed that the capability of the Colorado River Storage Project by the year 1967 will be 961,000 kws, and ultimately will be 1,200,000 kws, not including the Frying Pan-Arkansas project, and that, as disclosed by Exhibit 104, the Bureau of Reclamation has received applications from preference customers for power in that year in the amounts of approximately 631,000 kws in the summer and approximately 639,000 in the winter. 80% of 961,000 kws capacity equals 769,000 (round figures) kws available summer capacity, and 93% of 961,000 kws capacity equals 894,000 (round figures) kws available winter capacity.

Comparing the amounts of power asked in these applications for power of preference customers in the Northern Division to the amounts to which they are actually entitled shows that the Bureau has from the Colorado River Storage Project alone an additional 138,000 kws in the summer, and 255,000 kws in the winter, of 1967, over and above their requests for such power for use by these customers, if needed. These figures also are shown on Sheet No. 3 of Exhibit 511. There was some dispute between the parties as to the amount of power which would be available from this project of the Bureau at certain

times, however, that dispute was confined to the years prior to 1965 and there does not appear to be any question as to the validity of the figures for the years 1965, 1966, and 1967. The Bureau has not as yet requested applications for power for any period after 1967, but since there will also be additional capacity available after that year, it seems a certainty that the Bureau of Reclamation will be able to supply the needs of the preference customers in the Northern Division for some time past 1967. In fact, Colorado-Ute's chief engineering witness, Mr. Stanley, predicted in an engineering study submitted to REA to support the loan application (Exhibit 110) that the Colorado River Storage Project should be able to supply *preference customer loads until approximately 1975.* In his testimony before this Commission, he felt that load growths might be such as to reduce this period of availability to approximately 1970.

Giving consideration to all of the testimony upon this point, it is obvious that the requirements of Northern Division preference customers which they are entitled to obtain from the Bureau of Reclamation under the preference laws of the United States can be supplied by the Bureau from the Colorado River Storage Project through the year 1970, and perhaps through 1975.

The above comparison of the ability of the Bureau of Reclamation through the Colorado River Storage Project to meet all present and reasonably determinable future needs of Northern Division preference customers does not even take into consideration the existing generating facilities of Colorado-Ute, or of its proposed members, and is not predicated upon other generation of the Bureau itself. Colorado-Ute presently owns a generating station at Nucla, Colorado, with capability of approximately 38,-

000 kws and has under long term contract all of the output of what is known as the Bureau's Collbran Project with a capability of 13,000 kws. Arkansas Valley owns a generating unit in Canon City, Colorado, with a name-plate rating of 16,500 kws and maximum capacity of 17,500 kws. The concurrent existence of these generating facilities means that power generated by the Colorado River Storage Project will be sufficient to supply the additional needs of Colorado-Ute's proposed new members for even a longer period of time into the future. Moreover, the record reflects that the Bureau of Reclamation contemplates constructing other projects such as the Frying Pan Project within the next ten years, which will also be available on a preferential basis to these preference customers.

Some specific testimony bearing upon availability, the time element, and the reasonableness of rates follows:

Mr. Dominy testified at pages of the transcript indicated,

"Q. Then the applications for power from the Northern Division preference customers does not equal the amount of Bureau power they are entitled to in the year 1967, does it, Mr. Dominy?

"A. Under the marketing agreement they would *not yet* have fully utilized their allotment of Colorado Storage Power through 1967, that's true.

"Q. There would be more power available to them than they would require at that period of time?

"A. In the Northern Division, yes.

"Q. What would happen to the surplus power that they could not take at that time?

"A. It would be marketed to preference customers in the Southern Division over and above their final entitlement under the marketing criteria." (566-67)

"Q. Mr. Dominy, the Bureau of Reclamation has sent out applications to preference users to determine the amount of power that they will request during certain years, has it not?

"A. Yes, sir." (572)

"Q. The Bureau of Reclamation has not sent out formal contracts yet or determined the exact nature of the formal contracts, has it?

"A. That's correct, sir." (573)

"Q. Have you made any study or determination as to what the average rate will be for Upper Colorado River Storage Project Power?

"A. Yes, we have announced the general wholesale rate of six mills. . . ." (574)

"Q. What do you anticipate will be the provisions in a contract for preference customers for Upper Colorado River Storage Project with respect to changes in the rates from time to time throughout the course of the contract?

"A. Well, of course, there will be the standard provision that the rate can be adjusted. We always have to protect ourselves against rising costs, and to insure the pay-out; but, here again we have to rely on the competence of the people who make the projections, and their competence has been tested over many years, and we feel confident that our projections of a six mill rate is a valid one.

"Q. And would be applicable, say, throughout the 35-year period?

"A. We fully expect it to be." (575-76-77)

"Q. Mr. Dominy, when do you anticipate energy from the Frying Pan project will be available for preference customers or otherwise? . . . What would be your hopes, say?

"A. Well, I think the earliest that you could expect power in the lines, everything breaking favorably, would be 1968 to 1970, along in that range." (577)

Mr. Dominy again:

"Q. Thank you. Now, you are acquainted with the fact, Mr. Dominy, that the application of Colorado-Ute here is for 150,000 kilowatt units, are you not?

"A. Yes. sir.

"Q. Now, can you tell us what the wheeling charge in reference to the 150,000 will be? We know it has been calculated on the 600,000. Is there a calculation for 150,000?

"A. Yes. I don't have it in mind, but it's substantially higher. If only the 150 were to be installed, there is a different formula entirely that applies.

"Q. And do you know approximately percentagewise how much greater that is than the $1.75?

"A. I think it's something around $4.75 or $4.70, something in that range, but it's substantially righer if only the 150. (583-84)

"Q. And without the southern market, without the

Arizona market, this plan wouldn't be feasible at all, would it?

"A. Well, of course, the fact that we can move large blocks of Glen Canyon power south and replace it with Hayden power to supply our northern loads is what makes the plan desirable, plus the wheeling." (585)

. . . . . .

"Q. Now, assuming it (the Hayden Plant) can produce this power cheaper, and assuming that is its intention, Commissioner Dominy, and assuming that you had a problem with your southern division market, it's at least conceivable, isn't it, that you might find yourselves in a bind in marketing Colorado River storage project power?

"A. I think it's highly inconceivable. Colorado storage project power, being hydro, can be fitted into thermal generation in a very admirable fashion, and there is absolutely no doubt in my mind but what it's marketing at the projected six mill wholesale rate at load centers.

"Q. Even though all these preference customers upon whom all of your load studies again (depend?) say that the Colorado River project power is too expensive and they are going to construct steam?

"A. Yes. I have no concern that *the hydro power* from the Colorado storage, valuable as it is for peaking purposes, won't find a ready market at the rate that we can market it at six mills. It's quite one thing to talk about *steam generation if you are running the steam unit around the clock. It's quite another when you are turning it on and off and using it for peaking purposes.*" (588-89)

If construction of the Hayden Plant is authorized and

substituted as a source of power for the members of Colorado-Ute, it would only result in enabling the preference customers in the Southern Division to initially obtain more Bureau power than has been allocated to them, which excess will no doubt eventually be lost to the Northern Division and in turn to the Colorado consumers.

It is significant that no witness directly connected with the member distributing coops, or directly affected, or *consumers*, who would have first hand knowledge, testified as to needs, availability of supply from existing sources, adequacy of supply, or comparative evaluation of rates.

The testimony and exhibits in this proceeding clearly establish that the members of Colorado-Ute have available to them adequate present and future supplies of power at reasonable prices from existing sources, and that exchanging these sources of supply would in effect be swapping "a bird in the hand, for 2 in the bush"; actual experience, for future theoretical expectations; the known, for the unknown.

It appears that the Applicant has founded its case, in the main, on the premises that if the Hayden Plant and facilities be authorized, the power and energy produced will find a market, all the while ignoring substantial proof and competent evidence as to the availability or non-availability of power and energy from existing sources and the reasonableness of its cost to the consumers. To say the least, it has glossed over this phase, or, at most, tendered evidence which is vague, indefinite and uncertain.

In granting a certificate of public convenience and

necessity, the Commission must look to the ability of the Applicant to carry out the duties and obligations which will by issuance of the certificate devolve upon the Applicant. If there be any doubt about such ability, the Commission should proceed with utmost caution lest in granting the certificate its action will be detrimental to the public interest. If a certificate were granted in this instance to Colorado-Ute and its procurement of the necessary finances should be challenged, pending the definite and final procurement of the necessary finances; the present system and source of supply might be disarranged. The present available energy and power might be reallocated and committed elsewhere than for ultimate use by the Colorado consumers now entitled thereto. For, in the natural course of events, and the exercise of sound business judgment, the present suppliers would seek new outlets for their electric energy and power in the face of the imminent loss of their market. Colorado-Ute is seeking $22,876,000 from the Rural Electrification Administration. Administration funds are made available to rural electric associations by virtue of the Rural Electrification Act, under which the Administrator is authorized to:

> "• • • make loans for rural electrification to persons, corporations, states, territories, and sub-divisions and agencies thereof, municipalities, peoples' utility districts and cooperative, non-profit, or limited-dividend associations, organized under the laws of any State or Territory of the United States, for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service; • • • Provided further, That all such

loans shall be self-liquidating within a period of not to exceed thirty-five years, * * * And provided further, That no loan for the construction, operation or enlargement of any generating plant shall be made unless the consent of the State authority having jurisdiction in the premises is first obtained." (7 USCA 904)

"As used in this chapter the term 'rural area' shall be deemed to mean any area of the United States not included within the boundaries of any city, village, or borough having a population in excess of fifteen hundred inhabitants, and such term shall be deemed to include both the farm and nonfarm population thereof; * * *" (7 USCA 913)

A serious aspect of this law appears pertinent and must be considered by the Commission in determining the ability of the Applicant to procure the necessary finances to carry out the construction of the proposed plant and facilities.

The Commission may not have jurisdiction to determine whether the loan be, or not be granted, but it certainly may take into consideration imminent failure of acquisition of anticipated necessary funds, or long delay in their acquisition, which will without doubt result in serious detriment to the public interest.

The purpose of the Act is to provide funds for financing construction and operation of plants and systems "for the furnishing of electric energy to *persons in rural areas who are not receiving central station service* . . ." Is Colorado-Ute, a corporate entity, "a *person* in a rural area not receiving central station service?" I believe not.

Serious doubt, therefore, exists as to its ability to procure the necessary finances, if challenged.

As substantial doubt exists as to the procurement of the necessary funds to undertake and complete the construction, or, at the very least, as long delay in their procurement is obvious, this additional reason presents itself for denial of the application.

Basically the "Hayden Plant and facilities project" is an interstate venture over which this Commission will have very limited jurisdiction and thereby be, for all practical purposes, hopelessly restricted to effectively protect the Colorado public with which it is concerned; for among other things, what could the Colorado Commission do to protect the Colorado consumers if it should allocate to the rate base a certain amount of the cost of the plant and facilities for intrastate service, and the federal agency allocate a certain and different amount for interstate service, which 2 allocations would not account for the whole cost of the plant and facilities? In what manner could Colorado-Ute realize a just and reasonable return on that part of its plant and facilities not allocated to either the intrastate or interstate rate base? Colorado-Ute cannot be expected to operate at a deficit. Who would give ground the Colorado Commission, or the federal agency? If the former, the Colorado consumers would suffer;—to expect the latter, would be wishful thinking.

Should the Colorado consumers become involved, they will be inextricably tied to a business of producing electric power and energy for *interstate* sale, wherein they would have an insignificant part, would play only a minor role, would not know whither they are going, would be deprived of the full force and effect of this Commission's

regulatory power to protect them; would be jeopardizing their unique positions as "preference customers" of the Bureau of Reclamation; and, would be trading something of known value for an unknown quantity.

I respectfully submit that the public convenience and necessity do not require construction of the Hayden Plant and facilities; that the existing sources of supply have sufficient, adequate, and available, power and energy to meet the needs of the Colorado consumers for the present, for the immediate future, and for a reasonable period in the future; that the cost of such power and energy from existing sources of supply is just and reasonable; that it would be contrary to the public interest to grant the Applications and thereby subject the Colorado consumers to a debt of $22,876,000.00, and assume a contractual obligation to supply $8,610,000.00 in capacity, at cost, in consideration of doubtful benefits or, to say the least, benefits, which are not commensurate with the attendant risk, entanglements, and jeopardy; that the proposal is unsound for the Colorado consumers and contrary to public interest, and, that Application No. 19098, and Application No. 19156 should be denied.

This Order shall become effective twenty-one days from date.

HENRY E. ZARLENGO
Chairman

Dated at Denver, Colorado,
this 21st day of February, 1963
mls
(SEAL)
ATTEST: A TRUE COPY
J. J. MAHONEY
Secretary

Appendix B

IN THE DISTRICT COURT
IN AND FOR THE
COUNTY OF MONTROSE AND
STATE OF COLORADO

Civil Action No. 8897

THE WESTERN COLORADO POWER COMPANY, a Colorado Corporation, and PUBLIC SERVICE COMPANY OF COLORADO, a Colorado Corporation,
Petitioners,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, HENRY E. ZARLENGO, RALPH C. HORTON, and HOWARD S. BJELLAND, the individual members of said Commission, and COLORADO-UTE ELECTRIC ASSOCIATION, INC., a Cooperative Association, Respondents.

JUDGMENT

This matter is before the Court on petition for review of Decision No. 60156 of the Public Utilities Commission. Therein a Certificate of Public Convenience and necessity was granted to Colorado-Ute Electric Association, Inc. for erection of a coal-fired steam electric generation plant at Hayden, Colorado, and certain transmission lines and other appurtenances. Colorado-Ute was also authorized to borrow $22,876,000.00 from the Rural Electrification Administration of the United States and execute note and mortgage therefor.

The parties have argued this matter orally and the Court has read the voluminous pleadings, the transcript which without the innumerable exhibits exceeds 2,500 pages and the Court has considered the authorities relied on by the parties.

The Commission's order is the result of an opinion by Commissioner Horton specially concurred in by Commissioner Bjelland. Commissioner Zarlengo filed a dissenting opinion. The evidence was heard before Commissioners Horton, Zarlengo, and the predecessor of Bjelland, whose term expired before a decision was reached. The evidence was transcribed and considered by Bjelland and his opinion is based thereon.

Before any further discussion as to whether any rights of Petitioners have been violated it is necessary to describe their interest in this matter. In the dissenting opinion of Commissioner Zarlengo they are aptly described as "investigators and informants" for the Commission. Neither of them is selling power to any of the members and consumers of the fourteen distribution cooperatives, eleven of which directly, and three of which through Arkansas Valley G & T Inc. own and operate Colorado-Ute. Colorado-Ute has one additional member, Salt River Project Agricultural Improvement and Power District of Arizona.

Public Service Company may soon be losing some revenue it has enjoyed from sales of power to the Bureau of Reclamation and to various federal installations and may also lose some revenue from wheeling for the Bureau. These conditions however do not result from the proposed Hayden Steam plant but from the fact that power will

soon be available to the Bureau from the Upper Colorado River Storage Project hydro-electric installations.

Western Colorado Power Company has for several years operated Colorado-Ute's steam power plant at Nucla, Colorado under a contract. Colorado-Ute has given notice of termination of this contract which matter has been the subject of litigation in this court now pending on writ of error in the Supreme Court.

Both of Petitioners are willing to sell wholesale power to Colorado-Ute or its members but they could not do so at rates as low as those contemplated for sale of Bureau power to preference customers. It is their contention that the cooperatives should first apply for and use all Bureau power that might be allocated to them before constructing the Hayden Plant or any other generating plant.

After the decision of the Commission Petitioners objected to the participation of Commissioner Bjelland in breaking the tie between the other two commissioners. The contention that this was error is not sustained by the authorities cited on this point. The statute governing the Commission in the 115-2-6 and 115-6-9 CRS 1953 does not require all or even one of the commissioners to hear the evidence. The decision of controversies on written transcripts of evidence is a procedure common to courts as well as administrative agencies and does not deprive a party of due process of law. In the present matter the prolonged period of hearings and the bulk of the evidence would render a considered opinion virtually impossible without reviewing a transcript.

It is also argued that the Commission denied Petition-

ers the right of cross examination of certain witnesses by refusing discovery of certain records and particularly coal drilling logs in the area of the plant. If this was error, it was not prejudicial as the evidence of the witness as to the coal deposits was not essential to the decision.

With the Western Colorado Power Co. Petition for rehearing was filed a motion to reopen for newly discovered evidence which was denied. There was no abuse of discretion in this ruling.

The substantial issue tried was whether the cooperatives members should be allowed to build the steam plant to serve themselves with funds borrowed from the United States at 2% interest as contrasted with applying for larger allocations than they have of Bureau power. Relative costs were considered to be relevant to this issue and most of the evidence, nearly every point of which is disputed, revolves around relative costs. The evidence on both sides generally is that of alleged experts giving opinions on present and future costs of construction and operation, prospective load growth and other imponderables. The Commission with its own expert staff and specialized experience is certainly better equipped than any Court to weigh this type of evidence.

The incidental benefits from the plant to the Bureau, the Salt River Project, the Hayden area, the potential irrigators under proposed participating projects are not necessary to justify the decision and they certainly do not constitute reasons for denying the Certificate of Convenience and Necessity. Nor should Colorado citizens be denied the benefits of federal laws because such federal

laws may be in certain respects discriminatory against Petitioners.

Many other alleged errors are cited by Petitioners, but the Court finds them without merit and unnecessary to discuss at length.

It is concluded that the Commission in these matters regularly pursued its authority, that its findings and conclusions are based upon evidence in the record and that the constitutional rights of Petitioners and of the public have not been violated by the orders entered.

The order of the Public Utilities Commission in Decision No. 60156 on Applications No. 19098 and No. 19156 amended dated February 21, 1963 and the order denying rehearing of March 22, 1963, are affirmed.

Motion for new trial or rehearing would be unavailing and is dispensed with.

All parties shall pay their own costs.

DONE on this 5th day of December, 1963.

BY THE COURT:

George V. Kempf.

(FILED Dec. 5, 1963)

Appendix C

No. 21136 — *THE WESTERN COLORADO POWER COMPANY ET AL. V. THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO ET AL.* February 14, 1966. Error to the District Court of Montrose County, Honorable George V. Kempf, Judge. EN BANC. JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

Irvine & Baucom, Loesch & Kreidler, Barry & Boyle, Attorneys for Plaintiff in Error The Western Colorado Power Company. Lee, Bryans, Kelly & Stansfield, Bryant O'Donnell, Attorneys for Plaintiff in Error Public Service Company of Colorado. Duke W. Dunbar, Attorney General, Frank E. Hickey, Deputy Attorney General, Robert N. Trunk, Assistant Attorney General, Attorneys for Defendant in Error, The Public Utilities Commission of the State of Colorado, et al. Raphael J. Moses, John J. Conway, John A. Hughes, R. Jerry Bennet, Attorneys for Defendant in Error Colorado-Ute Electric Association, Inc.

MR. JUSTICE MOORE delivered the opinion of the Court.

We will refer to the parties as follows: to the Western Colorado Power Company as Western; the Public Service Company of Colorado as Public Service; the Public Utilities Commission as the Commission; and the Colorado-Ute Electric Association, Inc. as Colorado-Ute.

On May 11, 1962, Colorado-Ute filed an application with the Commission for a "Certificate of Convenience

and Necessity." The object of the application was to permit Colorado-Ute to construct near Hayden, Colorado, a steam electric generating plant with a nominal rating of 150,000 kilowatts, together with associated transmission lines and related facilities necessary to deliver power to certain new customers it sought to serve at wholesale. On June 14, 1962, Colorado-Ute filed a petition for an order of the Commission authorizing it to execute notes payable to the United States of America in an amount not to exceed $22,876,000 and mortgages to secure the notes in order to finance the project.

Public Service and Western filed protests in opposition to Colorado-Ute's requests and the matters were consolidated for hearing. Protests to those applications which were filed by Public Service and Western generally alleged that each was a public utility subject to the jurisdiction of this Commission engaged, among other things, in the generation, transmission and distribution of electric power and energy at wholesale and otherwise throughout various areas of the State of Colorado; that all or a portion of the lines, plant, and facilities proposed to be constructed by Colorado-Ute would cause physical and uneconomical duplication of the lines, plants, and systems of the companies which had been lawfully constructed and dedicated to the public use; that the companies then, and for many years past, had maintained electric generating facilities and transmission lines and related facilities adequate and sufficient to meet all present and future needs of their customers and service areas, and held themselves out as ready, willing and able to render wholesale electric service to Colorado-Ute or any of its members; that there did not exist any need nor necessity for the construction of the proposed plant and facilities of Colorado-Ute and

that if such construction was authorized by the Commission it would result in substantial damage to the companies and their electric consumers.

Subsequent to hearing, the Commission entered its order authorizing the construction of the Hayden plant and the financing thereof, but denying authority to construct certain of the facilities originally requested. Western and Public Service thereafter commenced certiorari proceedings in the district court, and from the judgment therein entered, affirming the Commission's decision, they bring writ of error here.

Colorado-Ute is an incorporated rural electric cooperative association engaged in generating and transmitting electric energy as a wholesaler. It proposes to sell electric energy to various customers it denominates "members" as well as to the Bureau of Reclamation, a nonmember. It further proposes to dedicate its facilities to whatever use the public convenience and necessity require, including the wheeling of power to protestants Public Service and Western. It is federally financed by the Rural Electrification Administration under the Rural Electrification Act of 1936 (Title VII, USCA 901). Eleven of its members are "distribution members" and distribute electrical energy directly to their users. Of the two other members, the Arkansas Valley G & T generates and transmits energy for its three "distribution members," and the Salt River Project Agricultural Improvement and Power District provides both electric and water service in the area surrounding Phoenix, Arizona. Salt River is not a cooperative but is a quasi-governmental organization incorporated under the laws of the State of Arizona.

Both Public Service and Western have been rendering electric service in Colorado since long prior to the time Colorado-Ute was first incorporated or ever constructed any generation and transmission facilities. Western serves in southwestern Colorado in the general area from Durango to Paonia, Colorado, and Public Service serves in a large area of the eastern slope of Colorado, including Denver, as well as in portions of western Colorado such as the San Luis Valley, Grand Junction, Rifle, and other specific areas within the state.

On this writ of error, contentions of Western and Public Service fall into three general categories: (1) That Colorado-Ute did not prove the need, demand, or necessity required by the law of public convenience and necessity for power to be provided by the Hayden Plant; (2) that the financial arrangements of Colorado-Ute with the Rural Electrification Administration are illegal; and (3) that numerous errors of an evidentiary, procedural, and administrative nature were committed by the Commission, all to the prejudice of Western and Public Service.

The first category consisted of six sub-categories, each of which, it is said, points to error because the action of the Commission, and the trial court in affirming the Commission, contravened the fundamental concept of public utility law relating to public convenience and necessity. In this respect it is asserted: (1) That the evidence established that proposed new customers of Colorado-Ute already had an adequate power supply and that these customers would merely change their source and commence taking their power from Colorado-Ute; (2) that the construction of the plant would duplicate service made available by Western and Public Service as well as other elec-

tric suppliers presently rendering such service; (3) that the estimates of power costs submitted by Colorado-Ute found no support in the evidence; (4) that the generation and transmission of energy at less cost, assuming the record established such fact, is not a factor in establishing public convenience and necessity where reliance upon cheaper energy as basis for certification would be destructive to the concept of regulated monopoly; (5) that it would not be in the public interest to permit the construction of the plant where it would put Colorado-Ute in a debt position of more than 100%; (6) that the Commission erred in receiving evidence concerning alleged benefits which would accrue to the Colorado River Basin fund as a result of the construction of the plant where the reception of such evidence was based upon the construction of a 600,000 k.w. plant and basing its decision thereon when the application was for a plant of only 150,000 k.w.

The Commission (by a two to one vote) found that public convenience and necessity demanded the construction of the Hayden Plant and its related facilities. This determination is the subject of attack by writ of error in this court. The record consists of some eight thousand pages with over twenty-five hundred pages of testimony. One hundred and twenty-four exhibits were offered. It would unduly lengthen this opinion to discuss in detail each facet of the evidence presented, and it is not necessary to do so.

The record discloses that the Colorado-Ute was organized in 1941 by a group of rural electric distribution associations on the Western Slope, but remained inactive for some years. In 1952 Colorado-Ute was reorganized, and it obtained a loan from the Rural Electrification Ad-

ministration to construct transmission lines and a generating plant to supply the electric requirements of its then members. Upon the completion of the construction of this plant, known as the Nucla plant, Colorado-Ute commenced serving, on a wholesale basis, four distribution cooperatives located in the southwestern portion of the state. At the time of the hearing before the Commission there was then pending an application by Colorado-Ute to commence serving a fifth member located near Grand Junction, Colorado.

The alleged purpose to be served by the construction of the Hayden plant is to supply the electric requirements not of its five members but of thirteen members. This would have the effect of making Colorado-Ute the wholesale supplier of electric energy to a large portion of the State of Colorado, as well as to a small portion of the State of Wyoming and the State of Utah, and a large supplier to the Salt River Project in Arizona. Each of these eight potential new customers of Colorado-Ute is now receiving service from other sources, and the existing Nucla Plant of Colorado-Ute is adequate to serve the requirements of the five earlier members. It is thus apparent that Colorado-Ute seeks to commence rendering electric service on an expanded basis in areas it has not heretofore served, to customers it has never before served, and to customers and in areas where electric service is being supplied and is available from other existing sources.

Wholesale electric service to many of the proposed new distribution cooperative customers of Colorado-Ute was for many years supplied by other utilities in the area, and later by the Bureau of Reclamation, and all parties to this proceeding are distinctly in the wholesale electric

business. Arkansas G & T is an organization similar to Colorado-Ute and supplies wholesale electric service to three distribution cooperatives. Arkansas Valley obtains its power by purchase from municipal electric plants and from its own generating plant located near Canon City. This, in turn, it wholesales. The effect of the Commission's decision is to substitute Colorado-Ute as the source of supply for all of these proposed new members. For instance, those receiving wholesale service from the Bureau of Reclamation will terminate such purchases; those proposed new customers which have generating plants will dispose of these plants by one means or another; and those new customers which purchased from municipalities will no longer do so. Arkansas G & T, which only recently completed the construction of its Canon City generating plant, will no longer obtain any power from its own plant but instead will purchase from Colorado-Ute.

Although there was much conflicting testimony with respect to the ability of the Bureau of Reclamation to continue meeting the wholesale requirements of the proposed new members of Colorado-Ute, all three Commissioners concurred in a finding that Bureau power—the existing source of supply of many of these cooperatives—was adequate for the foreseeable future. In addition the record clearly reflects that the Arkansas G & T plant is more than adequate to meet the anticipated demands of its customers for a considerable period of time. It is also shown by the record that Public Service and Western have adequate generating facilities with which to meet the demands of any wholesale requirements in their respective areas should existing sources prove insufficient.

Under these circumstances, it is apparent that the generating capabilities of existing electric suppliers in the

State of Colorado are more than adequate to supply increased electrical needs without the addition of the Hayden plant, which was to be constructed only for the purpose of providing service to substitute for that already being rendered.

Confronted with the fact that there was no need for Colorado-Ute to expand its operations to serve customers already being served, the two concurring Commissioners evolved a theory that such new customers could pick and choose between (1) continuing service from existing suppliers, (2) purchasing wholesale requirements from certificated investor-owned utilities, or (3) purchasing from Colorado-Ute if it obtained authority to construct the Hayden plant. This is shown by the following statement of Commissioner Horton:

> "That Ute, the applicant herein as we interpret the record, has to elect from three sources of power available to take care of their present and future needs:
>
> "1. To purchase power from the investor-owned utilities represented by the Protestants herein;
>
> "2. To avail themselves of Bureau Power from The Colorado River Storage Project; and
>
> "3. To construct a steam electric plant at Hayden."

QUESTIONS TO BE DETERMINED

First. *Does public convenience and necessity require the construction and operation of the Hayden plant in view of the acknowledged adequacy of existing service?*

We answer this question in the negative. The State of Colorado has long been dedicated to the principle of "regulated monopolies" in the conduct of public utility operations. This principle has been the public policy of this state since the year 1913 when the Public Utilities Act of the State of Colorado was first adopted. The concept has never varied in a long line of decisions of this court. We will comment upon some of those decisions later in this opinion, but it is here observed that as recently as September 13, 1965, in the case of *Colorado Transportation Company vs. The Public Utilities Commission of the State of Colorado,* ..... *Colo.* ....., 405 P.2d 682, this court again reminded the P.U.C. of the concept of regulated monopoly as follows:

> "It would seem to us that probably the real reason for the Commission's falling into error in the instant case is the fact that even at this comparatively late date it professes to be uncertain as to whether utility regulation of motor carriers in Colorado is based upon the theory of 'regulated competition' or 'regulated monopoly.' As illustrative thereof, during the course of the hearing, one Commissioner opined as follows:
>
> > " 'We have a peculiar situation here and I hardly know how to rule. Our federal concept, as I under (sic) it, has been on the theory of regulated competition. If you can tell me what the Colorado concept is—I don't know. We have got rulings that indicate both ways.'
>
> "And then in its formal findings and order, the Commission stated as follows:

" 'The Colorado (Public Utilities) Commission, for the past twenty years, has regulated motor carriers for hire under the belief that the theory of regulated competition was in compliance with our law. We will not attempt to resolve this question as it would appear it is a matter of law which we feel is beyond our jurisdiction and should be left to the courts. ***'

"It is too late to debate the merits of the competing principles of 'regulated competition' and of 'regulated monopoly' in the field of utility regulation. Despite the claimed uncertainty of the Commission, the State of Colorado has long been wedded to the concept of regulated monopoly in the field of public utility regulation. For the benefit of the Commission, a few of the many cases which say so, are: *Ephraim Freightways, Inc. v. Public Utilities Commission*, 151 Colo. 596, 380 P.2d 228; *Donohue v. Public Utilities Commission*, 145 Colo. 499, 359 P.2d 1024; *Denver & Rio Grande Western Railroad Co. v. Public Utilities Commission*, 142 Colo. 400, 351 P.2d 278; and *Archibald v. Public Utilities Commission*, 115 Colo. 190, 171 P.2d 421. For better or for worse, then, Colorado is quite definitely committed to the principle that public utility regulation is based upon the theory of a 'regulated monopoly.' "

There are a great many other cases adhering to the regulated monopoly principle and no purpose would here be served by reference to all of them. Suffice it to say that these cases clearly show that the regulated monopoly principle is not consistent with the theory of the case upon

which the two concurring Commissioners based their decision.

The statute which is determinative of the basic issue in this case is C.R.S. 1963, 115-5-1, which provides as follows:

> "115-5-1. New construction—extension.—(1) No public utility shall begin the construction of a new facility, plant, or system, or of any extension of its facility, plant, or system, without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction. Sections 115-5-1 to 115-5-4 shall not be construed to require any corporation to secure such certificate for an extension within any city and county or city or town within which it shall have theretofore lawfully commenced operations, or for an extension into territory, either within or without a city and county or city or town, contiguous to its facility, or line, plant, or system, and not theretofore served by a public utility providing the same commodity or service, or for an extension within or to territory already served by it, necessary in the ordinary course of its business. ***"

The above statute makes mandatory proof of public convenience and necessity prior to the construction of any new plant or system, subject to certain exceptions. It is obvious that none of the exceptions are applicable in this case, and Colorado-Ute has never contended to the contrary. This statute is the foundation of the regulated monopoly principle and as this court has observed on many occasions it was designed to prevent duplication of

facilities and competition between utilities, and to authorize new utilities in a field only when existing ones are found to be inadequate. *Ephraim Freightways, Inc. v. Public Utilities Commission*, 151 Colo. 596, 380 P.2d 228; *Donohue v. Public Utilities Commission*, 145 Colo. 499, 359 P.2d 1024; *Public Service Company v. Public Utilities Commission*, 142 Colo. 135, 350 P.2d 543; *Public Utilities Commission v. Donahue*, 138 Colo. 492, 335 P.2d 285; *Public Utilities Commission v. Loveland*, 87 Colo. 556, 289 Pac. 1090. It is our view that Commissioner Zarlengo correctly understood the force and effect of the statute and its application to the issues in this case as indicated by the following quotation from his dissent:

> "It is obvious that the objective of the statute is to avoid duplication of sources of power in the public interest. Why should the consuming public pay for, and maintain, two sources of power if one will do, or 3 sources of power if 2 will do, etc., etc.? The law, therefore, subjects proposals for new, or expanded, construction to the judgment of the Commission and in such cases the Applicant must make an affirmative showing that the purpose of the statute will not be defeated.
>
> • • •
>
> "It is incumbent upon the Applicant 'to tip the scales' in the direction that duplication will not result from its proposed action. In doing this it must show that there is a need for the additional construction which necessarily involves showing that the existing sources are, and will, not be reasonably adequate and available."

It is impossible for this court to reconcile its previous

pronouncements with the statement of Commissioner Horton that Colorado-Ute could pick and choose the manner in which it availed itself of public utility service, one important kind of which is the furnishing of wholesale power, a service performed for many years by both protestants, and one as entitled to the protection of its regulated monopoly status as any other. Allowing customers to pick and choose from whom they will obtain any public utility service obviously creates rather than prevents duplication, fosters rather than controls competition, and totally disregards the principle that inadequacy of existing facilities must be shown in order to authorize a new service.

It appears from the record that Colorado-Ute initially recognized that it was required to satisfy these basic principles of public convenience and necessity if it were to prevail. Much evidence was produced in an effort to show that the Bureau of Reclamation did not have sufficient power to meet the requirements of Colorado-Ute's proposed new customers. As indicated, each of the three Commissioners found to the contrary, and to illustrate the complete lack of proof of this essential ingredient of public convenience and necessity we quote from the Commission's decision. Commissioner Horton stated:

> "***However, the Bureau assures Ute that power and energy will be made available to them as preference customers by Act of Congress, from the Colorado River Storage Project."

Commissioner Bjelland agreed in the following language:

> "***Even as the record clearly establishes the fact that Ute needs more power, it equally clearly establishes that Ute's immediate needs and reasonable fu-

> ture needs can be satisfied by purchasing hydroelectric power from the Colorado River Project. Ute and its member cooperatives are preference customers for power from this project, and preference power for the Upper Division States will in all liklihood *not be fully utilized until the mid* 1970's. *This source of power is stable and the price is reasonable.* ***''
> (Emphasis supplied)

Commissioner Zarlengo, in his dissent, stated:

> "Giving consideration to all of the testimony upon this point, it is obvious that the requirements of Northern Division preference customers which they are entitled to obtain from the Bureau of Reclamation under the preference laws of the United States *can be supplied by the Bureau from the Colorado River Storage Project through the year* 1970, *and perhaps through* 1975." (Emphasis supplied)

The evidence of the capacity or ability of Arkansas Valley to continue supplying its customers' requirements was clearly established by the record. Thus, existing sources of supply to the proposed new customers of Colorado-Ute were conclusively shown to be adequate. It should also be noted that the determination of the adequacy of existing sources was made without giving any consideration to other potential suppliers such as plaintiffs in error who were ready, willing and able to render this service in their respective areas.

We agree with Commissioner Zarlengo when he points out in his dissenting opinion the lack of evidence of public convenience and necessity:

"It appears that the Applicant has founded its case, in the main, on the premises that if the Hayden plant and facilities be authorized, the power and energy produced will find a market, all the while ignoring substantial proof and competent evidence as to the availability (58) or non-availability of power and energy from existing sources and the reasonableness of its cost to the consumers. To say the least, it has glossed over this phase, or, at most, tendered evidence which is vague, indefinite and uncertain."

To affirm the decision of the Commission authorizing the construction of the Hayden plant where existing service was already adequate, would require a complete departure by this court from its previous decisions. The fundamental misconception of Colorado-Ute is its failure to recognize that, under regulation, existing suppliers are entitled to serve all desiring service, whether they be existing or potential customers. In our early decision in *Public Service Company v. Loveland, supra,* we protected the right of the existing utility to render electric service to potential customers, even though the utility was not then serving them. A recent case in point is the case of *Public Utilities Commission v. Verl Harvey, Inc.,* 150 Colo. 158, 371 P.2d 452, where the Commission had granted a certificate for an expanded motor carrier operation without finding that existing carriers were inadequate or unable to perform the desired service. The existing carriers had protested the expanded authority sought by one Watson because they were ready, willing and able to perform the service even though none of the customers involved were then served by them. The following quotation from that opinion is particularly suited to the issues here:

"Presented to the commission in opposition to granting of any authority to Watson was the contention of protestants, supported by uncontradicted evidence that licensed carriers were ready, able and willing to fill the requirements of shippers, including the needs of those who have been using the service of Watson. Instead of making a finding that additional facilities were or were not needed, the commission expressly avoided answering this very important question, and stated:

> "That the services which Applicant seeks to provide are necessary for the public convenience and necessity even though there are other carriers who allege (though the Commission does not so find from the record) that they can adequately fill the vacuum which would result from cessation of operations by the Applicant."

The decision of this court in *Donahue v. Public Utilities Commission, supra,* is also particularly significant in view of the contentions here raised by Colorado-Ute. In that case the Commission had failed to find that service by existing carriers was inadequate but granted the authority requested on the basis that there was sufficient business to support the new carrier. In rejecting that concept of public convenience and necessity, and again adhering to the absolute requirement that the Commission find inadequacy of service before granting a new certificate, we said:

> "***The finding by the commission that '***nor can we say that his (protestant's) service is adequate at this time,' falls far short of a finding of failure reasonably to supply the need. There is not sufficient

competent evidence in this record to warrant any such finding. The finding which is called the 'serious question' confronting the commission, namely, 'Is there sufficient business to warrant two certificated carriers?' amounts to a repudiation of the basic concept upon which the structure of Public Utility Commission powers is based, namely, that of regulated monopoly."

All in all, on review of the record and the two concurring opinions of the majority of the Commission, it is apparent that no real effort was made to decide this case in a manner consistent with the pertinent statute (C.R.S. 1963 115-5-1) and our many decisions construing and interpreting it. Instead, an approach of "nonregulation" was employed, as appears from the following statement quoted from the Commission's findings:

> "We do not feel that the Commission should assume the burden of speculation on a matter so vital to thousands of consumers when the Colorado-Ute Board has made a management decision to construct the Hayden Plant."

Our statement in the case of *Consolidated Freightways Corporation v. Public Utilities Commission*, ... Colo. ....., 406 P.2d 83, bears repeating:

> "Regulation—not non-regulation—has been declared to be in the public interest."

In summarizing the factual situation presented by the record, it is apparent that,

1. adequate electric service is already available to

the State of Colorado for the needs and necessities of the proposed new customers of Colorado-Ute; therefore

2. the construction of the Hayden Plant, requiring an investment of approximately thirty million dollars, is not necessary to supply any present or foreseeable future electric requirements, and Colorado ratepayers should not be required to support it; and

3. affirmance of the district court's judgment and the decisions of the Commission would sanction a duplication of existing electric facilities which are adequate to supply the needs of the public; and

4. the affirmance of the district court and Commission decisions by this court would be inconsistent with the doctrine of regulated monopoly and would, as we stated in *Public Utilities Commission v. Verl Harvey, supra,* render regulation "wholly ineffective and meaningless."

Having discussed the Colorado law of Public Convenience and Necessity as a crucial point upon which the decision in this case turns, we must inquire whether there are any other considerations which should, for reasons special to this case, absolve Colorado-Ute from the necessity of proving that the public convenience and necessity requires construction of the Hayden plant. If such considerations exist it must be admitted at the outset that the result would emasculate the concept of regulated monopoly and the entire Colorado structure of public utility law.

SECOND: *Does Colo. Sess. Laws* 1961, *ch.* 198, 115-1-3(2), *which generally conferred jurisdiction over cooperatives in the Public Utilities Commission, violate the Constitution of Colorado or of the United States?*

This question is answer in the negative. At the commencement of its consideration of this case, the court requested and received an additional oral argument from counsel, upon questions concerning the constitutionality of the 1961 amendments (particularly Session Laws of Colorado 1961, ch. 198, 115-1-3(2) to the Public Utility Law, and the consequent investiture of the Public Utilities Commission with jurisdiction of cooperatives.

Prior to the occasion of this oral argument Colorado-Ute had not questioned the constitutionality of the Act, had filed its application before the Commission and followed the matter through Commission, district court, and briefs in this court without suggesting unconstitutionality.

The power to regulate entities affected with a public interest is a function of the police power of the state, and any business or activity which is affected with a public interest may be so classified and so regulated. *Eachus v. People,* 124 Colo. 154, 238 P.2d 885; *Nebbia v. New York,* 291 U.S. 502; *Minn. v. Illinois,* 94 U.S. 113; *Idaho Power & Light v. Blomquist,* 141 Pac. 1083 (Idaho 1914); *Boone County Rural Electric Membership Corporation et al. v. Public Service Commission of Indiana, et al.,* 159 N.E. 2d 121, 239 Indiana 525; *Kentucky Utilities Company v. Public Service Commission,* 252 SW 2d 885 (Ky. 1952); *Dairyland Power Cooperative v. Brennan,* 248 Minn. 556, 82

NW 2d 56; *Orendoff v. Public Utilities Commission*, 135 Ohio State 438, 21 NE 2d 334.

The record shows that Colorado-Ute in wholesaling electric power intends to serve various classes of customers including consuming cooperatives, other wholesaling cooperatives, governmental or quasi-governmental bodies (Salt River), and even an arm of the Federal Government, the Bureau of Reclamation, together with any other applicants for service if approved by the Commission. We hold that its business is affected with a public interest and is subject to regulation under the police power of the State of Colorado, and that such regulation does not violate either the Constitution of the State of Colorado or the Constitution of the United States.

The 1961 amendments to the Public Utilities Law of the State of Colorado are valid, enforceable, and constitutional. C.R.S. 1963, 115-1-3(2) provides:

> "Every co-operative electric association, or nonprofit electric corporation or association, and every other supplier of electrical energy, whether supplying electric energy for the use of the public or for the use of its own members, is hereby declared to be affected with a public interest and to be a public utility and to be subject to the jurisdiction, control, and regulation of the commission and to the provisions of articles 1 to 7 of this chapter."

This statute is couched in clear and cogent terms. It makes no exceptions. "*Every* co-operative electric association" is a public utility, as well as all other electric suppliers.

No issue has been raised in this case that Colorado-

Ute is not a "co-operative electric association." By the terms of the statute, therefore, it is subject to the "jurisdiction, control and regulation" of the Public Utilities Commission, and we so hold.

Colorado-Ute in its application before the Public Utilities Commission readily admits that it is a public utility. The application contains the following:

> "Applicant is a corporation organized and existing under and by virtue of the laws of the State of Colorado subject to the jurisdiction of this Commission under the provisions of H.B. No. 245 passed by the Colorado Legislature and signed by the Governor on April 23, 1961. ***
>
> "The public convenience and necessity requires the construction of said generating plant, transmission lines, and related facilities, and the interconnections herein described."

These allegations are consistent only with the concept that Colorado-Ute is a public utility, and are inconsistent with any idea that it is concerned only with the needs and requirements of its co-operative members.

Western and Public Service admit that Colorado-Ute is a public utility. The legislature has declared in no uncertain terms that it is a public utility. It furnishes electrical energy which is used by countless consumers in a very large segment of this state. The widespread interest of the public is clearly shown, and this court should not declare the legislative act to be void, especially when the parties themselves admit that it is valid and enforceable.

There is an abundance of authority to support the classification of a wholesale of energy to distributors as a public utility. *North Carolina Public Service Co. et al. v. Southern Power Co.*, 282 Fed. 837; *Boone County Rural Electric Membership Corporation et al. v. Public Service Company of Indiana, et al.*, 239 Ind. 525, 159 N.E.2d 121; *Orndoff v. Public Utilities Commission*, 135 Ohio State 438, 21 N.E. 2d 334; *Industrial Gas Company v. Public Utilities Commission of Ohio*, 135 Ohio St. 408, 21 N.E. 2d 166; *Wisconsin Traction Company v. Green Bay & Miss. Canal Co.*, 188 Wisc. 54, 205 N.W. 551.

The co-operative form of organization obviously has nothing to do with the question of what constitutes the public convenience and necessity, or with the obligation of any utility to prove public convenience and necessity in accordance with the theory of regulated monopoly as expressed by the statutes of the State of Colorado and the decisions of this court. These statutes were enacted for the benefit of the public as a whole, and result in the granting of regulated status to a supplier of a commodity essential to the public interest. Under regulation, an electric consumer need not be a member of a co-operative to secure its service. Likewise a consumer located in an area exclusively served by such co-operative must take its service if indeed service is to be received at all. The form of organization delivering service makes no difference whatever to these consumers and the legislature recognizes reality when it specifically places the co-operatives under the regulatory arm of the state.

As long ago as 1926 this court, in the case of *Davis v. Public Utilities Commission*, 79 Colo. 642, 247 Pac. 801, determined that in examining an activity affected with the

public interest it would look to substance and ignore form. In that case the court said:

> "In determining whether a business is that of a common carrier 'the important thing is what it does, not what its charter says.' *Terminal Taxicab Co. v. Kutz, et al.*, 241 U.S. 252, 36 Sup. Ct. 583, 60 L.Ed. 984, Ann. Cas. 1916D, 765. A service may effect (sic) 'so considerable a fraction of the public that it is public in the same sense in which any other may be called so . . . . The public does not mean everybody all the time.' "

That wholesaling of electric power *is* affected with a public interest is well illustrated by the fact that if it were not so, Public Service or Western could spin off their generation and transmission functions to a subsidiary corporation, and thus evade and defeat the regulation of wholesale power rates, and thereby the rates to the ultimate consumer. Certainly the legislature no more intended this result in the case of the co-operatives than it did in the case of the investor-owned utilities.

> THIRD. *Does the fact that Colorado-Ute, a co-operative, has but thirteen members who are also co-operatives, warrant treatment of a different kind than that which would be applicable to any other kind of membership?*

This question is answer in the negative. We find no merit to the argument that as a co-operative whose members are other co-operatives, Colorado-Ute is merely an extension or adjunct of these member co-operatives so that its act is the act of its members, and for that reason Colorado-Ute is not subject to regulation.

We observe first that Colorado-Ute is in all respects a separate legal entity; it has its own distinct corporate organization, including directors and officers; and it deals with its customers, whether co-operatives or not, by means of long term power supply contracts. It is obvious that the decision to construct the Hayden plant was the decision of Colorado-Ute itself rather than its members as of the time the decision was made to build the Hayden plant. At that time it had no more than five members. Many of its new members did not become members or agree to power purchase contracts until shortly before the Commission hearing commenced, which was long after the decision to construct the plant was made. It is, therefore, apparent that Colorado-Ute, instead of being the alter ego of its members, is the complete master of its own destiny. Thus the concept of it as a mere extension or adjunct of the distribution co-operative members has no legal or factual basis and is a forced and artificial one. But even if we accepted the artificial idea of the nature of Colorado-Ute as an alter ego, so to speak, of its members, no different application of the legal principles here involved would result. There is no contention in this case that those customers of Colorado-Ute that are themselves co-operatives are *not* public utilities and are *not* subject to the jurisdiction of the Public Utilities Commission.

Any such co-operative, which had not theretofore generated its own electricity, would be required to secure Commission approval if it proposed to construct such a plant, (C.R.S. 1963, 115-5-1) and of course if it came before the Commission with such purpose it, like any other utility, would be required to prove that the public convenience and necessity demanded such construction because it would then be engaging in a wholly new and dis-

tinct type of utility service (generation) theretofore supplied by "a public utility providing the same commodity or service."

Similarly, Colorado-Ute did not go before the Commission seeking to extend *existing* facilities to serve *existing* customers. The record shows clearly it had ample facilities to serve all of its then existing customers and that the purpose of its application was to expand its service from a small area in southwestern Colorado to cover substantially all Western Slope as well as many thousands of square miles in the southeastern portion of the state.

In closing the discussion of the nature of Colorado-Ute, it may be remarked that its suggested status as an adjunct of its individual co-operatives is belied by what occurred. None of the distributive co-operatives were parties to the proceedings and their representatives did not appear before the Commission to give evidence in their own behalf that the public convenience and necessity required construction of the Hayden plant, and this lack cannot be supplied by mere speculation on the part of either Commission or court.

Secondly, Colorado-Ute is not by any means "a co-operative of co-operatives." As we have already noted, of its thirteen members eleven are distribution co-operatives, one is a wholesale co-operative of a nature similar to that of Colorado-Ute itself, and the thirteenth—and by far the largest of all of its members—Salt River, is a governmental or quasi-governmental agency of a nature completely different from that of all other members.

It is thus clearly apparent that the business of Colo-

rado-Ute is affected with a special interest far beyond that of its eleven distributive co-operatives and therefore is not immune from regulation.

FOURTH. *Does the fact that the Hayden plant has already been completed require an affirmance of the judgment of the trial court?*

The answer is "No." The court is aware that the Hayden plant is now constructed. This fact, however, cannot subvert the legal principles upon which our decision is based nor be allowed to defeat the doctrine of regulated monopoly to which Colorado subscribes. It is clear that both Colorado-Ute and the REA, its financing associate (who was not before the Commission) recognized that construction of the Hayden plant during litigation was attended with substantial risk, and they engaged in such activity with full knowledge of the possible consequences.

For good reason, no contention is made that the construction precludes decisions by this court. It is the law, that when the interest of the public is concerned it is not only the right but the duty of an appellate court to determine the issues, regardless of interim construction. *Bruce v. Leo*, 129 Colo. 129, 267 P.2d 1017; *Reserve Life Insurance Company, Dallas, Texas, v. Frankfather*, 123 Colo. 77, 225 P.2d 1035; *Golden v. People ex rel.*, 101 Colo. 381, 74 P.2d 715; *Pallas v. Johnson*, 100 Colo. 449, 68 P.2d 559; *Jackson v. Denver Producing and Refining Company*, 96 F.2d 457 (10th Circuit 1938); *Southern Pacific Terminal Company v. Interstate Commerce Commission*, 219 U.S. 498, 55 L.Ed. 310; *Franks v. State Highway Commission*, 182 Kan. 131, 319 P.2d 535; *Moore v. Smith*, 160 Kan. 167,

160 P.2d 675; and *Moore v. White*, ... Okla. ....., 323 P. 2d 352.

Colorado-Ute solemnly assured the Commission and district court that in the event of the reversal of the Commission order, Colorado-Ute and its Colorado consumers would escape scatheless from adverse economic consequences because Salt River of Arizona would then assume the obligation for the Hayden plant. The record discloses that counsel for Colorado-Ute wrote the Commission under date of March 21, 1963, specifically stating that Salt River had agreed to take the Hayden plant off the hands of Colorado-Ute at no loss to Ute in the event that "some court" subsequently ruled that the certificate should not be issued.

The district court warned applicant and its members and its participating financiers of the possible consequences of proceeding pendente lite, in the following language:

> "If the cooperative members are willing to pledge their credit and the United States and the Salt River Project are prepared to spend the money to build this Plant in Colorado upon their expectation that the decision of the Public Utilities Commission will be sustained in the Courts, the progress of the work during the litigation would appear to cause no damage in law to anyone."

In the unlikely event of loss it will not be borne by ultimate consumers of electricity, but will fall upon those who saw fit to go ahead notwithstanding the manifest uncertainty of their position and the express provisions of

Section 4 of the Rural Electrification Act in which the Congress of the United States provided:

> "That no loan for the construction, operation, or enlargement of any generating plant shall be made unless the consent of the State authority having jurisdiction in the premises is first obtained. Loans under this section and section 5 shall not be made unless the Administrator finds and certifies that in his judgment the security therefor is reasonably adequate and such loan will be repaid within the time agreed."

When litigation in accordance with the statutes and procedures of the state in question is in progress, it needs no citation of authority to establish that consent of the state authority to the construction has not been obtained, nor could any reasonable person believe that security for the proposed loan is adequate and that the loan will be repaid in due course when the very right to construct the plant is still in litigation. The Court of Appeals for the 4th Circuit had occasion to examine related questions in the case of *Greenwood County v. Duke Power Company*, 107 Fed.2d 484, and said at pages 488-89:

> "The question of law as to whether the Public Works Administrator could lawfully make a loan and grant to a county for the construction of a project such as this was a new one and one upon which the opinion of able lawyers and judges was divided. It was in the interest of all parties concerned that the question be authoritatively settled before monies were advanced and expenditures made * * *"

> "* * * The mere pendency of the suit raising such questions was sufficient to prevent advancement of

funds by an officer of the United States, irrespective of the granting of the temporary injunction."

Before concluding this opinion we desire to make additional comments on the Commission's decision for the purpose of future reference and guidance. The Commission is primarily a fact finding body and has few, if any, of the attributes of an appellate court. It is required by law to make findings of fact upon which any necessary judicial review of its actions can be predicated. In the instant case, the lack of findings of fact by the Commission and the confusion arising from the separate statements by the respective commissioners as to what, if any, facts were agreed upon by the Commission as a regulatory body, have had grave consequences.

In order to get the matter before this court, the lack of proper findings first required counsel to prepare and file exceedingly long briefs and appendices and it next caused this court a massive amount of drudgery. Both of these results have contributed to delay in disposing of a case which is affected with great public interest.

The judgment of the trial court is reversed and the cause remanded with directions that it vacate its judgment and thereafter direct the Commission to vacate and set aside its decision No. 60156.

MR. CHIEF JUSTICE SUTTON concurs in the result.

MR. JUSTICE FRANTZ dissents.

MR. JUSTICE FRANTZ dissenting:

By holding that Colorado-Ute is what it cannot be, the majority has effectively incapacitated it as the supplier of

energy for its members. The reasoning of the majority, simply stated, is this: Colorado-Ute is a public utility. Its existence as a public utility is offensive to the law of this state relating to regulated monopolies. This conclusion flows from the finding of the Commission, supported by evidence, that there were other sources available from which the members of Colorado-Ute could obtain energy. There being other sources, the Hayden plant is a duplication of facilities, which effectually closes the door to any determination of convenience and necessity for its existence, the sine qua non for its justification.

Once the court accepts the premise that Colorado-Ute is a public utility, that which is then said logically follows. It is with the determination that Colorado-Ute is a public utility that I am in disagreement. In the operation of the Hayden plant, Colorado-Ute is not a public utility, and my view in this respect arises from three basic considerations: (1) Colorado-Ute is a cooperative corporation made up of thirteen members which are, in turn, corporate cooperatives, and for these thirteen members it will manufacture and sell electrical energy at wholesale; (2) the order of the Commission confined the sale of energy at wholesale to the thirteen members, thereby removing Colorado-Ute from the public utility concept of dedicating its property to the public service or use; and (3) this court should not put an interpretation on the facts of this case which makes invalid our constitutional provision and the statutes relating to public utilities.

If in the operation of the Hayden plant, Colorado-Ute is not a public utility, a majority opinion to the contrary would have a devastating effect upon a legitimate enterprise for which there has been a very substantial invest-

ment. The importance of this decision as it relates in general to our public utilities law and in particular to the continuation of the Hayden plant as a source of electrical energy places a heavy responsibility upon this court.

By Article XXV, the Constitution of Colorado vests the legislature with complete authority over public utilities "as presently or as may hereafter be defined * * * by the laws of the State of Colorado. . . ." For reasons which will be hereinafter stated, I take the position that any definition of a public utility must remain within the traditional concept of the term; that the legislature may not by fiat make enterprises, which would not fall within the traditional meaning of the term, public utilities.

Presently the term "public utility" is defined by statute. The definitive statute is C.R.S. 1963, 115-1-3. It provides:

> "(1) The term 'public utility' * * * includes every common carrier, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, person or municipality operating for the purpose of supplying the public for domestic, mechanical, or public uses, and every corporation, or person *now or hereafter declared by law to be affected with a public interest*, and each thereof, is hereby declared to be a public utility . . .
>
> "(2) Every co-operative electric association, or nonprofit electric corporation or association, and every other supplier of electrical energy, whether supplying electric energy for the use of the public or for the use of its own members, is hereby declared to

be affected with a public interest and to be a public utility . . ." (Emphasis supplied.)

Were the constitution and statute to be construed as applying to private corporations not serving the public, their invalidity would immediately arise because:

(1) such construction would unjustly interfere with private property rights in contravention of the due process clause of the 14th amendment to the federal constitution;

(2) such construction would infringe upon private contractual rights which are protected by Article 1, Section 10 (1) of the federal constitution; and

(3) such construction would be in derogation of the Enabling Act, which recognizes implicitly property rights and the freedom to enter into private contracts.

Selecting only electric cooperatives for regulation as a public utility violates the equal protection clause of the 14th Amendment, and by reason thereof subsection 2 of C.R.S. 1963, 115-1-3, cannot be sustained.

In any consideration of the problem, it is necessary to revisit some fundamental law regarding public utilities. What makes an enterprise a public utility, and why is a public utility under some restraints which are not applicable to corporations not serving the public?

"A corporation becomes a public service corporation, subject to regulation by the department of public service, only when, and to the extent that, *its business is dedicated or devoted to a public use*. The test to be applied is wheth-

er or not the corporation holds itself out, expressly or impliedly, *to supply its service or product for use either by the public as a class or by that portion of it that can be served by the utility, or whether, on the contrary, it merely offers to serve only particular individuals of its own selection.*" (Emphasis supplied.) *Inland Empire Rural E. v. Department of Public Service,* 199 Wash. 527, 92 P.2d 258. In support of this proposition the Supreme Court of Washington cites a host of cases from states of the Union.

Our court has recognized the theory of law that a public utility embraces the idea that property must be devoted to a public use before it may be regulated as such. A public utility is "a system of works operated for public use, examples of which are telephone, street railway, water, electric light and power, gas works, and other systems." *Searle v. Town of Haxtun,* 84 Colo. 494, 271 Pac. 629.

The court asked itself in *Colorado Utilities Corporation v. Public Utilities Commission,* 99 Colo. 189, 61 P.2d 849:

> "Is Moffat Coal Company, under the facts presented, a public utility within the meaning of the Public Utilities Act?"

and answered:

> "* * * Moffatt Coal Company made no dedication of its property or any part thereof to a public use; it made no offer, and did not hold itself out, to serve the public as a public utility as such term is used in the statute above mentioned . . ."

To be a public utility "a business or enterprise must be impressed with a public interest *and* *** those engaged in the conduct thereof must hold themselves out as serving or ready to serve all members of the public, who may require it, to the extent of their capacity. The nature of the service must be such that all members of the public have an *enforceable right to demand it.*" (Emphasis supplied.) *Englewood v. Denver*, 123 Colo. 290, 229 P.2d 667; *Public Utilities Commission v. Colorado Co.*, 142 Colo. 361, 351 P.2d 241.

Nowhere is the difference between operations subject to police power regulation and those subject to public utility regulation so well demarcated as in the leading case of *Allen v. Railroad Commission*, 179 Cal. 68, 175 Pac. 466, 8 A.L.R. 249. Since its language is precise and definitive, I quote from it extensively:

> "* * * In its broadest sense everything upon which man bestows labor for purposes other than those for the benefit of his immediate family is impressed with a public use. No occupation escapes it, no merchant can avoid it, no professional man can deny it. As an illustrative type one many instance the butcher. He deals with the public; he invites and is urgent that the public should deal with him. The character of his business is such that under the police power of the state it may well be subject to regulation, and in many places and instances is so regulated. The preservation of cleanliness, the inspection of meats to see that they are wholesome, all such matters are within the due and reasonable regulatory powers of the state or nation. But these regulatory powers are not called into exercise because the butcher has

devoted his property to public service so as to make it a public utility. He still has the unquestioned right to fix his prices; he still has the unquestioned right to say that he will or will not contract with any member of the public. What differentiates all these activities from a true public utility is this, and this only: That the devotion to public use must be of such character that the public generally, or that part of it which has been served and which has accepted the service, has the right to demand that that service shall be conducted, so long as it is continued, with reasonable efficiency under reasonable charges. *Public use, then, means the use by the public and by every individual member of it, as a legal right.*" (Emphasis supplied.)

Whether an electrical plant is a public utility "depends upon what it does and not upon the power conferred upon it by charter." *Colorado Utilities Corp. v. Public Utilities Commission, supra.* It is commonplace doctrine that "a private corporation cannot be converted into a public service corporation by mere legislative fiat. What it does is the important thing, not what it, or the state, says it is." *Inland Empire Rural E. v. Department of Public Service, supra.*

The statutory provision that enterprises "affected with a public interest" are public utilities has a narrow meaning—one in keeping with the customary concept of what constitutes a public utility. "Under our statute defining public utilities, Cobb's pipe-line operations must be impressed with a public interest. That it is not so impressed is readily determined by the fact that plaintiffs here, and the public, have no right to demand the service. • • • It is a reiteration of the principles laid down in

the Englewood case, supra, to say that *before Cobb and his operations could be classified as a public utility, he must hold himself out as serving, or ready to serve, all members of the public who may require it.''* (Emphasis supplied.) *Parrish v. Public Utilities Commission,* 134 Colo. 192, 301 P.2d 343.

In so limiting the scope of the term, ''affected with a public interest,'' our court is in harmony with the much-quoted definitive language of former Chief Justice Taft in the case of *Wolff Packing Co. v. Court of Industrial Relations,* 262 U.S. 522, 43 S. Ct. 630, 67 L.Ed. 1103, 27 A.L.R. 1280, approved and followed in *People ex rel. Industrial Commission v. Aladdin Theatre,* 96 Colo. 527, 44 P.2d 1022. There Justice Taft said:

> ''Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:
>
> ''(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.
>
> ''(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs, and gristmills. (citing cases)
>
> ''(3) Business which, though not public at their

inception, may be fairly said to have risen to be such, and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner, by devoting his business to the public use, in effect, grants the public an interest in that use, and subjects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner, and to be entitled to protection accordingly."

It appears to be a rule of general application that cooperatives serving only their own members are not public utilities. See Annotation in 132 A.L.R., at page 1498. But if they serve their members and others, or hold themselves out as willing to serve others, the majority rule appears to be that they are public utilities. Idem.

In *Garkane Power Co. v. Public Service Commission*, 98 Utah 466, 100 P.2d 571, 132 A.L.R. 1490, the same situation confronted the court as in our case—"the corporation (was) specifically prohibited from rendering service for or to the public"; it could only serve its members. In holding that the cooperative was not a public utility, the Supreme Court of Utah uttered these words:

"• • • So long as a cooperative serves only its own owner-members and so long as it has the right to select those who become members, ordinarily it matters not that 5 or 1000 people are members or that a few or all the people of a given area are accorded membership, provided the arrangement is a bona fide cooperative or private service organization and is not

> a device prepared and operated to evade or circumvent the law."

To like effect, see *Socorro Elec. Coop. Inc. v. Public Service Co.*, 66 N.M. 343, 348 P.2d 88.

To hold that a cooperative corporation, created to manufacture and sell at wholesale to thirteen incorporated cooperatives, who sell at retail, is a public utility by giving the statutory definition a strange and unconventional meaning leads to unconstitutionality. To place a corporation not purposing to serve the public indiscriminately in the status of a public utility means (1) that it must sell to all whom it physically can serve rather than retain its constitutional right of being at liberty to contract with whom it pleases, and (2) that, although its operation is limited, its property is by decree dedicated to a public use, a taking of property without due process.

Courts have sometimes used one or the other of these constitutional barriers to stay the hands of states which would make a business a public utility, when in fact it was not one. And sometimes they have used both grounds. There will be no attempt here to segregate them. Mr. Chief Justice Taft forewarns of constitutional impediments involved in an effort by the state to enlarge the scope of the "public interest" by legislation in the case of *Wolff Packing Co. v. Court of Industrial Relations, supra*, saying:

> "If, as, in effect, contended by counsel for the state, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorized full and comprehensive regulation within legislative discretion, there must be a

revolution in the relation of government to general business. This will be running the public-interest argument into the ground, to use a phrase of Mr. Justice Bradley when characterizing a similarly extreme contention. Civil Rights Cases, 109 U.S. 3, 24, 27 L.ed. 835, 3 Sup. Ct. Rep. 18. It will be impossible to reconcile such results with the freedom of contract and of labor secured by the 14th Amendment."

The Supreme Court of the United States, in addressing itself to the contention of the plaintiff in error in the case of *Producers Transportation Co. v. Railroad Commission*, 251 U.S. 228, 40 S.Ct. 131, 64 L.Ed. 239, used language that is most apt:

> "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, *the State could not by mere legislative fiat or by any regulating order of a commission convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no State can do consistently with the due process of law clause of the Fourteenth Amendment.*" (Emphasis supplied.)

The Supreme Court of the United States considered the status of a private carrier who was limited to transportation in interstate commerce under three contracts and had not undertaken to carry for the public nor to devote his property to any public use, *Michigan Public Utilities Commission v. Duke*, 266 U.S. 570, 45 S. Ct. 191, 69

L.Ed. 445, 36 A.L.R. 1105. The Court admonished that "it is beyond the power of the State by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no State can do consistently with the due process of law clause of the Fourteenth Amendment. *Producers Transportation Co. v. Railroad Commission,* 251 U.S. 228, 230; *Wolff Co. v. Industrial Court,* 262 U.S. 522, 535. On the facts above referred to, it is clear that, if enforced against him, the act would deprive plaintiff of his property in violation of that clause of the Constitution."

In *Frost Trucking Co. v. Railroad Commission,* 271 U.S. 583, 46 S. Ct. 605, 70 L. Ed. 1101, 47 A.L.R. 457, the Supreme Court of the United States considered a statute of the state of California, the Supreme Court of which had construed a provision of the state statute as requiring a private contract carrier to obtain a certificate of public convenience and necessity before doing business over the state highways, as a condition obliging dedication of the carrier's property to the business of public transportation, thereby subjecting him to all the duties and burdens imposed by the act upon common carriers. The Court declared: "that, consistently with the due process clause of the Fourteenth Amendment, a private carrier cannot be converted against his will into a common carrier by mere legislative command, is a rule not open to doubt and is not brought into question here."

Smith v. Cahoon, 283 U.S. 553, 51 S. Ct. 582, 75 L.Ed. 1264, involved the constitutionality of the Florida statute covering carriers. Its constitutionality was challenged on

the ground that it was repugnant to the due process and equal protection clauses of the 14th Amendment to the federal constitution. Relying upon the *Duke* and *Frost* cases, *supra*, the Court said that "such a scheme of regulation of the business of a private carrier, such as the appellant, is manifestly beyond the power of the State."

Stephenson v. Binford, 287 U.S. 251, 53 S. Ct. 181, 77 L.Ed. 288, 87 A.L.R. 721, confirms the view that the state cannot by legislative fiat convert property used exclusively in the business of a private carrier into a public utility or make the owner thereof a public utility, since that would be the taking of private property for public use without just compensation, in violation of the due process clause of the 14th Amendment.

There are many state decisions which have followed these federal cases. Only a few typical cases need be cited.

Allen v. Railroad Commission, supra, declares:

> " 'Our constitution and our statutory definitions above quoted therefore must be construed as applying only to such properties as have in fact been devoted to a public use, and not as an effort to impress with a public use properties which have not been devoted thereto. For if the latter be the true construction of our Constitution and statutes, then manifestly in their operation they are void wherever they unjustly interfere with private property or private contractual rights by force of article 1, § 10, and of the Fourteenth Amendment of the Constitution of the United States. If the first alternative be selected, then, for reasons already given, such parts of those

properties as are affected by the contracts with these petitioners have not been devoted to public use and their private contractual rights must prevail."

In the *Allen* case, the constitutional provision is quite like our constitutional provision, ordaining that "every class of private corporations, individuals or associations of individuals, hereafter declared by the legislature to be public utilities, shall likewise be subject to such control and regulation." The court in that case in effect requires the traditional meaning to be given to the term "public utilities."

Dairymen's Coop. Sales Ass'n v. Public Service Commission, 318 Pa. 381, 177 Atl. 770, 98 A.L.R. 218; *Hertz Drivurself Stations v. Siggins,* 359 Pa. 25, 58 A.2d 464; and *Inland Empire Rural E. v. Public Service Commission, supra,* are a few other instructive cases. In the last case a true co-operative, one serving only its members, was involved.

The *Allen* case, *supra,* is of utmost importance because of the constitutional authority in the legislature, as in ours, to define a public utility. It was held that this was not a carte blanche authority; that the definition would have to conform to the one traditionally used in order to avoid federal unconstitutionality.

The *Inland Empire* case, *supra,* is equally important, because it was a cooperative serving only its members, and the Supreme Court of Washington observed that any attempt to hold its operation to be a public utility would run afoul of the protections of the 14th Amendment to the United States Constitution.

The Enabling Act is the paramount law of this state

and all constitutional provisions of our fundamental state document must be consistent with it. In the event of a conflict the constitution must yield to the Enabling Act. The Enabling Act directed the Constitutional Convention of this state to form a constitution which would "not be repugnant to the constitution of the United States and the principles of the declaration of independence." Section 4. Both the Federal Constitution and the Declaration of Independence recognize the rights to life, liberty, and the pursuit of happiness. This word "liberty" has been construed to include freedom to contract and freedom to hold property under appropriate regulations where such are necessary.

An Enabling Act becomes "and is a fundamental and paramount law. It cannot be altered, changed, amended, or disregarded without an act of Congress." A state constitution "cannot be inconsistent with the Enabling Act." *Murphy v. State,* 65 Ariz. 338, 181 P.2d 336.

The term "liberty" appearing in the Declaration of Independence has the same meaning as it has in the federal and state constitutions. See *McKinster v. Sager,* 163 Ind. 671, 72 N.E. 854, 68 L.R.A. 273. Freedom to contract is embraced within the term "liberty" as used in these documents. 16 Am. Jur. 2d, pages 704-706, substantiates the assertion:

> "Although the term 'freedom of contract' does not appear in the Constitution, the right to enter into a contract, with some exceptions, is a liberty which falls within the protection of the due process clause of the Fourteenth and Fifth Amendments to the Constitution of the United States. It is also safeguarded by the constitutions of the states, and, by a constitu-

tional guaranty of pursuit of happiness. In general it may be said that the privilege of contracting is both a liberty and a property right."

It seems obvious to me that the selection of electrical cooperatives as being public utilities, subject to the restraints under which they operate, and leaving gas, telephone, carrier, and other cooperatives outside the definition, constitutes a classification in violation of the equal protection provision of the 14th Amendment. In this respect I believe that the opinion of Mr. Chief Justice Harris of the Supreme Court of Arkansas, in the case of *Arkansas Commerce Commission v. Arkansas & Ozarks Railway Co.*, 235 Ark. 89, 357 S.W.2d 295, has some relevance. Attention is also called to the case of *Evansville & Ohio Valley Ry. Co. v. Southern Ind. Rural Electric Corp.*, 231 Ind. 648, 109 N.E.2d 901.

C.R.S. '53, 115-1-3, has been unjustifiably broadened by the majority to thereby make Colorado-Ute a public utility within the breadth of the statute's language. Cooperatives are of two kinds: those which serve only their members, and those which serve their members and the public. See 132 A.L.R. 1490, and annotation. The statute is so drafted that it covers both, and in each instance the members or public are consumers of the electrical energy. To bring a cooperative which shall manufacture and sell at wholesale for a few cooperatives (retailers) within the purport of the statute is an unwarranted extension of the statute, and for reasons already stated, violative of the federal constitution.

The enigmatic status of Colorado-Ute pervades the record of this case. An additional oral argument was ordered by this court, in which the parties were directed to

answer certain questions propounded by the court relating to its status as a public utility. Public Service and Western relied upon the statute, while Colorado-Ute's position was one difficult to assess. However, the latter confessed that it had problems in reconciling Colorado-Ute's limited operation with that which is ordinarily believed to be the sphere of action of a public utility.

Commissioner Horton stated "that there is a very serious doubt in the mind of the Commission that the legislative intent was to require Ute to obtain a certificate of public convenience and necessity to construct a plant at Hayden to serve its members."

In its opening brief (page 108) Colorado-Ute points to C.R.S. '53, 115-1-3, for an answer to the following comment and question:

> "Accordingly, it is perfectly clear from the record that Colorado-Ute is a wholesaler of electric energy to its members only, and the areas in Colorado served by these members is clearly shown on Exhibit 9 . . . Does such a status make it a public utility?"

Since cooperatives, such as those involved in this case, have an impact upon public utilities supplying electrical energy, it is right and proper that they be regulated, not as public utilities, but as business impressed with the public interest. What governmental agency is better situated to perform this function than the Public Utilities Commission?

I would sustain the Commission upon the basis that its action was regulatory under the statute, and that any part of its decision in excess of regulation is without force and effect.

Appendix D

No. 21136—*WESTERN COLORADO POWER CO. V. PUBLIC UTILITIES COMMISSION.* March 14, 1966. On Petition for Rehearing.

ADDENDUM by MR. JUSTICE MOORE.

The petition for rehearing filed on behalf of Colorado-Ute contains five separately numbered points which counsel asserts this court overlooked or misapprehended. We considered them in some detail in the following point by point reference.

Point I. It is argued that our decision (a) denies Colorado-Ute the authority to serve its members and gives protestants the exclusive right to do so; (b) requires Colorado-Ute to sustain a higher degree of proof of public convenience and necessity than that required of other utilities by requiring it to show inadequacy of service by a nonpublic utility; and (c) denies Colorado-Ute the same opportunities afforded other public utilities to construct facilities to serve existing members, in violation of the due process and just compensation clauses of the Fifth Amendment to the United States Constitution.

None of these assertions is true. (A) Our decision does not deny Colorado-Ute authority to furnish electric energy to the members it had acquired when the application was made for a certificate; it does, however, deny it permission to expand its facilities and spread its service areas to a point where it would encompass those already being adequately served by other certificated suppliers of electrical energy. Our decision does not give the protest-

ants the exclusive right and privilege of rendering such service, but it does protect all public utilities against competition by new public utilities without adequate proof and findings that public convenience and necessity requires the new facility or expanded new service. The decision violates no constitutional right of Colorado-Ute, because its service is affected with a wide public interest and it must therefore conform to the Public Utilities Law of the State of Colorado, and the well established doctrine of regulated monopoly which is an important part of that law.

(B) The decision does not require a higher degree of proof by Colorado-Ute; it does, however, hold that no proper proof of public convenience and necessity was shown as a matter of law by the record, particularly when the unanimous conclusion of all members of the Utilities Commission was that adequate sources of power already existed to supply the needs of the *proposed new members* of Colorado-Ute. Our decision points out (at pages 10 and 11 thereof) that the Commission considered all existing sources (not just those available from the Bureau of Reclamation) and found them to be adequate. The requirement of the Public Utilities Law is to protect the public from supporting increased investment (in this case in excess of 30 million dollars) without regard to whether that investment would duplicate the facilities of a regulated or a nonregulated supplier. The adverse economic impact upon the public is the same whether the existing source of supply is a federal agency (and therefore unregulated by state authority) or a public utility subject to regulation by the Commission. We refer back to page 21 of our opinion in this connection where pertinent legal conclusions are drawn.

(C) Our decision does not deny Colorado-Ute "the same opportunities afforded to other public utilities to construct facilities to serve existing members." The "existing members" referred to in the petition for rehearing are the *proposed new members* for whom it would be necessary that Colorado-Ute expand its service area to a large portion of the State of Colorado, and have additional electrical energy at its disposal. Colorado-Ute has not been denied the right to serve its original members. Its desire to construct *new facilities* and to serve *new members* was the very issue requiring proof of public convenience and necessity which it failed to sustain because of the Commission's conclusion that existing sources of energy were adequate. Colorado-Ute cannot bypass this burden of proof merely by entering into contracts with potential new members or customers who are not suffering from lack of electrical service by existing suppliers.

Point II. In this assignment of error it is asserted that this court misconstrued C.R.S. 1963, 115-5-1. This, too, we believe is not true. This section, in addition to prohibiting a public utility from interfering with any other such utility, provides that no new plant or system can be constructed without proof of public convenience and necessity, subject to certain exceptions (none of which were found to be applicable in this case). The fact that the Bureau of Reclamation is not a public utility again does not absolve Colorado-Ute from proving public convenience and necessity, and neither does it detract from the law that duplicating facilities requiring enormous investments should not be supported by the consuming public if they are unnecessary. The record discloses that it was Colorado-Ute who initiated all testimony with respect to the availability or lack of availability of Bureau power, and

it is too late for it to now contend that this evidence should not be considered in determining public convenience and necessity.

Point III. It is here asserted that the court "misapprehended" the constitutionality of C.R.S. 1963, 115-1-3 (2) (the legislative declaration that co-operatives are public utilities) in that it violates due process, infringes upon private rights of contract, and violates equal protection of the law in violation of pertinent provisions of the Constitution of the United States.

Under this assignment of error Colorado-Ute completely reverses the position it unequivocally took before the Commission and throughout the entire proceeding, and apparently places reliance at this late date upon the content of the views of one dissenting justice. It now takes the position that it is not a public utility. Reference is made to that portion of the opinion in which we discuss in detail the fact that the business of Colorado-Ute is affected with a public interest and is properly classified by the legislature as a public utility. This allegation contained in the petition for rehearing is the first formal pleading ever filed in this case by Colorado-Ute in which it is claimed that it is not a public utility subject to the jurisdiction and regulation of the Public Utilities Commission. Its position before that body was exactly the opposite. Mr. Moses, representing Colorado-Ute, made the following statement during a forensic colloquy relating to the question as to whether his client was a public utility. It appeared that in a document filed with the Commission it was asserted that Colorado-Ute, "* * * is or may be a public utility."

"MR. BARRY: No, sir.

"COMMISSIONER HORTON: I have no further questions then.

"MR. MOSES: I might say for the record and in explanation of this, that this application was copied from our last securities application which was filed when counsel had some question in counsel's mind. Counsel doesn't have any questions any more.

"MR. BARRY: I am sorry, Mr. Moses, I was talking with Mr. Baucom. What did you say?

"MR. MOSES: I said in essence that this was my error, and that it was copied from our previous securities application which was filed at a time when there was a question in my mind as to whether they were a utility or not. There is no question in my mind anymore.

"MR. BARRY: Maybe we can clear up the record, and I think it would be better. Would you like to amend your application to delete the words 'may be'?

"MR. MOSES: I would be perfectly happy to delete the words 'may be' to make it consistent, because I think we are a utility.

"COMMISSIONER ZARLENGO: Have the record show that the petition No. 19156 dealing with securities is amended by dropping the words in paragraph one, 'or may be.'

"MR. MOSES: Thank you."

Points IV and V. It is claimed in both of these assignments of error that this court made findings of fact—paragraph four alleging this to be unconstitutional, and paragraph five asserting that this court violated the statute which requires affirmance by the reviewing court

of a finding which has sufficient support in the evidence. The finding of fact alleged to have been made by the court is that existing power sources were adequate. Clearly, this was not a finding of fact by this court. That finding was made by the Commission and is abundantly supported by the evidence. The opinion of this court contains references to the decision of the Commission where all three Commissioners found an adequacy of existing sources. Had this court made a finding to the contrary we would then have been in a position of having unwarrantedly substituted our judgment for that of the Commission, in which case those adversely affected would have ground for complaint.

It is alleged in paragraph five that the Public Utilities Commission expressly found that existing power supplies were not adequate and references to the record are given. This allegation is specious. The Commission did not so find; on the contrary, it found existing sources adequate, and also, that there were in fact alternative sources of power available to Colorado-Ute's proposed new members including that available by certificated public utilities authorized to serve in the area. The reference to C.R. p. 5144 (being a portion of the Commission's decision) not only fails to sustain Colorado-Ute's contention, but actually refers to a finding of the Commission that existing sources were adequate. Other references to the record before the Public Utilities Commission point to portions thereof where Colorado-Ute attempted to prove Bureau power inadequate; this was expressly rejected by all three members of the Commission. Such references to the record are merely a rehash of disputed testimony which was not accepted by the Commission. The references to C.R. p. 1682 and p. 1915 do not support the assertion that existing

power sources are inadequate; actually, the Commission found to the contrary of this assertion as shown at pages 11 and 12 of the court's decision.

The petition for rehearing filed by the Public Utilities Commission is substantially similar to the petition filed by Colorado-Ute. Therefore, since no new or other issues were raised by the Commission's petition, the discussion relating to the Colorado-Ute petition for rehearing is equally applicable to the Commission's petition.

The foregoing discussion, while perhaps unnecessary, is presented in the hope that it may add clarity to the opinion and demonstrate that the points urged in the petition for rehearing were not overlooked or misapprehended by this court.

The petition for rehearing is denied.

MR. JUSTICE FRANTZ, for reasons stated in his dissent, would grant the petition for rehearing.

Appendix E

Constitutional and Statutory Provisions Involved

1. *From the United States Constitution*:

Article 1, *Section* 10(1): "*No State shall* enter into Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; *pass any* Bill of Attainder, ex post facto Law, or *Law impairing the Obligation of Contracts*, or grant any Title of Nobility." (Emphasis added).

The 5th *Amendment*: "*No person shall be* held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be *deprived of* life, liberty, or *property, without due process of law; nor shall private property be taken for public use, without just compensation.*" (Emphasis added).

The 14th *Amendment, Section* 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of* life, liberty, or *property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*" (Emphasis added).

2. *From the Colorado Constitution*:

Article XXV (25): "In addition to the powers now vested in the General Assembly of the State of Colorado, *all power to regulate the facilities,* service and rates and charges therefor within home rule cities and home rule towns, *of every corporation,* individual, or association of individuals, wheresoever, situate or *operating within the State of Colorado,* whether within or without a home rule city or home rule town, *as a public utility,* as presently or as may hereafter be defined as a public utility by the laws of the State of Colorado, *is hereby vested in such agency of the State of Colorado as the General Assembly shall by law designate.*

"*Until such time as the General Assembly may otherwise designate, said authority shall be vested in the Public Utilities Commission of the State of Colorado;* provided however, nothing herein shall affect the power of municipalities to exercise reasonable police and licensing powers, nor their power to grant franchises; and provided, futher, that nothing herein shall be construed to apply to municipally owned utilities." (Emphasis added).

3. *From* 1963 *Colorado Revised Statutes* (*CRS*):

115-1-1: "Articles 1 to 7 of this chapter shall be known as "The Public Utilities Law" and shall

apply to the public utilities and public services described in said articles and to the commission referred to in article 2."

115-1-3: "(1) *The term "public utility,"* when used in articles 1 to 7 of this chapter, *includes every* common carrier, pipe line corporation, gas corporation, *electrical corporation,* telephone corporation, telegraph corporation, water corporation, person or municipality *operating for the purpose of supplying the public* for domestic, mechanical, or public uses, and every corporation, or person now or hereafter declared by law to be affected with a public interest, and each thereof, is hereby declared to be a public utility and to be subject to the jurisdiction, control, and regulation of the commission and to the provisions of articles 1 to 7 of this chapter. Nothing in articles 1 to 7 of this chapter shall be construed to apply to irrigation systems, the chief or principal business of which is to supply water for the purpose of irrigation, or to exemptions provided for in the constitution of the State of Colorado relating to municipal utilities.

"(2) *Every* cooperative electric association, or *non-profit electric corporation or association,* and every other supplier of electrical energy, *whether supplying electric energy for the use of the public or for the use of its own members, is hereby declared to be affected with a public interest and to be a public utility* and to be subject to the jurisdiction, control, and regulation of the commission and to the provisions of articles 1 to 7 of this chapter." (Emphasis added). (This provision, being a part of House Bill 245, was adopted in 1961).

115-1-4(2): "*The power of every* gas corporation and of every *electrical corporation operating as a public utility* as defined in section 115-1-3, *to issue,* assume or guarantee *securities,* and to create liens on its property situated within this state *is a special privilege, hereby subjected to the supervision and control of the commission.* Such public utility when authorized by order of the commission and not otherwise, may issue, assume or guarantee securities with a maturity date of more than twelve months after the date thereof for the following purposes: the acquisition of property; the construction, completion, extension or improvement of its facilities; the improvement or maintenance of its service; the discharge or lawful refunding of its obligations; the reimbursement of moneys actually expended for said purposes from income or from any other moneys in the treasury not secured by or obtained from the issue of securities within five years next prior to the filing of an application with the commission for the required authorization; or any of such purposes or any other lawful purpose authorized by the commission." (Emphasis added).

115-5-1(1): "*No public utility shall begin the construction of a new facility, plant, or system, or of any extension of its facility, plant, or system, without first having obtained from the commission a certificate* that the present or future public convenience and necessity require or will require such construction. Sections 115-5-1 to 115-5-4 shall not be construed to require any corporation to secure such certificate for an extension within any city and county or city or town within which it shall have theretofore lawfully

commenced operations, or for an extension into territory, either within or without a city and county or city or town, contiguous to its facility, or line, plant, or system, and not theretofore served by a public utility, providing the same commodity or service, or for an extension within or to territory already served by it, necessary in the ordinary course of its business. If any public utility, in constructing or extending its line, plant, or system shall interfere or be about to interfere with the operation of the line, plant, or system of any other public utility already constructed, the commission, on complaint of the public utility claiming to be injuriously affected, after hearing, may make such order prohibiting such construction or extensions or prescribing such terms and conditions for the location of the lines, plants, or systems, affected as to it may seem just and reasonable." (Emphasis added).

115-5-1(2): "Whenever the commission after a hearing upon its own motion or upon complaint, shall find that there is or will be a duplication of service by public utilities in any area, the commission shall, in its discretion, issue a certificate of public convenience and necessity assigning specific territories to one or to each of said utilities or by certificate of public convenience and necessity to otherwise define the conditions of rendering service and constructing extensions within said territories, and shall, in its discretion, order the elimination of said duplication, all upon such terms as are just and reasonable, having due regard to due process of law and to all the rights of the respective parties and to public conveni-

ence and necessity." (This provision, being a part of House Bill 245, was adopted in 1961).

115-6-15(2): "*The findings and conclusions of the commission on disputed questions of fact shall be final and shall not be subject to review,* except that, in any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the constitution of the United States, or the constitution of the state of Colorado, the district court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the said constitutional question shall not be final. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceedings. Upon hearing, the district court shall enter judgment either affirming, setting aside, or modifying the order or decision of the commission. The provisions of the rules of civil procedure of this state relating to writs of certiorari or review, so far as applicable and not in conflict with the provisions of articles 1 to 7 of this chapter, shall apply to proceedings had in the district court under the provisions of this section. *No court of this state, except the district court to the extent specified, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission* or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties; provided, that the writ of mandamus shall lie from the district court to the commission in all proper cases." (Emphasis added).

115-6-16(1): "*The pendency of a writ of certiorari or review shall not of itself stay or suspend the operation of the order or decision of the commission;* but, during the pendency of such writ, the district court, in its discretion, may stay or suspend, in whole or in part, the operation of the commission's order or decision." (Emphasis added).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 437

COLORADO-UTE ELECTRIC ASSOCIATION, INC., a cooperative association, *Appellant*,

v.

THE WESTERN COLORADO POWER COMPANY, a Colorado Corporation, PUBLIC SERVICE COMPANY OF COLORADO, a Colorado Corporation, and THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, HENRY E. ZARLENGO, RALPH C. HORTON, and HOWARD S. BJELLAND, the individual members of said Commission, *Appellees*.

MOTION OF APPELLEES THE WESTERN COLORADO POWER COMPANY AND PUBLIC SERVICE COMPANY OF COLORADO TO DISMISS.

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INDEX

	Page
Motion of Appellees The Western Colorado Power Company and Public Service Company of Colorado to Dismiss	1
Question Presented	1
Statement	2
Argument	8
Conclusion	15

Citations

Cases:

Beck v. *Washington*, 369 U.S. 541	11
Boylan v. *United States*, 310 F. 2d 493 (9th Cir. 1962)	13
Charles River Bridge v. *Warren Bridge*, 11 Pet. 420	14
Chesapeake & Ohio Ry. v. *United States*, 283 U.S. 35	11
Cities Service Co. v. *Peerless Co.*, 340 U.S. 179	10
Curtis, Inc. v. *United States*, 225 F. Supp. 894 (D. Colo.), *aff'd*, 378 U.S. 128 (1964)	11
Eck Miller Transfer Co. v. *Armes*, 269 S.W. 2d 287 (1954)	10
El Paso v. *Simmons*, 379 U.S. 497	14
F.C.C. v. *Pottsville Broadcasting Co.*, 309 U.S. 134	11
Ferguson v. *Skrupa*, 372 U.S. 726	10
Fordham Bus Corporation v. *United States*, 41 F. Supp. 712 (S.D. N.Y. 1941)	13
General Alarm v. *Underdown*, 76 Ariz. 235, 262 P. 2d 671 (1953)	10
I.C.C. v. *J-T Transport Co.*, 368 U.S. 81	11
Interstate Commerce Commission v. *Parker*, 326 U.S. 60	11, 12
McFayden v. *Publ. Util. Consol. Corp.*, 50 Idaho 651, 299 Pac. 671 (1931)	10

	Page
Milwaukee Electric Ry. & Light Co. v. *Wisconsin ex rel. Milwaukee*, 252 U.S. 100	11
Missouri Pac. Ry. Co. v. *State Corp. Comm.*, 192 Kan. 575, 389 P. 2d 813 (1964)	10
National Broadcasting Co. v. *United States*, 319 U.S. 190	11
Nebbia v. *New York*, 291 U.S. 502	10
New York v. *Squire*, 145 U.S. 175	10
Northern Pacific Railway v. *Duluth*, 208 U.S. 583	14
Olsen v. *Nebraska*, 313 U.S. 236	10
People ex rel. Hafer v. *Flynn*, 14 Ill. App. 2d 301, 144 N.E. 2d 747 (1957)	10
Public Utilities Commission v. *Donahue*, 138 Colo. 492, 335 P. 2d 285 (1959)	12
Public Utilities Commission v. *Verl Harvey, Inc.*, 150 Colo. 159, 371 P. 2d 452 (1962)	12
Southern Iowa Electric Company v. Chariton, 255 U.S. 539	10
State ex rel. Util. Comm. v. *Carolina Coach Co.*, 260 N.C. 43, 132 S.E. 2d 249 (1963)	10
State of Missouri ex rel. Laclede Gas Light Co. v. *Murphy*, 170 U.S. 78	10
Union Dry Goods Co. v. *Georgia P.S. Corp.*, 248 U.S. 372	10
United States v. *Oklahoma Gas & Electric Co.*, 297 Fed. 575 (8th Cir. 1924)	10
Virginia Stage Lines v. *Commonwealth*, 185 Va. 390, 38 S.E. 2d 576 (1946)	10
Western Union Div. Commercial Telegraphers v. *United States*, 87 F.Supp. 324 (D.D.C.), *aff'd*, 338 U.S. 864 (1949)	11
Williamson v. *Lee Optical Co.*, 348 U.S. 483	10, 11
Yellow Cab Co. of Pittsburgh v. *Pennsylvania Pub. Util. Comm.*, 161 Pa. Super. 41, 54 A. 2d 301 (1947)	10
Yellow Transit Co. v. *State*, 198 Okla. 229, 178 P. 2d 83 (1947)	10

Statutes:

	Page
Communications Act of 1934, 48 Stat. 1075 (1934), as amended, 47 U.S.C. §§ 214(a), 307(a)	11
Motor Carrier Act of 1935, 49 Stat. 543 (1935), as amended, 49 U.S.C. §§ 307(a), 309(b)	11
Public Utilities Law of Colorado	*passim*
Transportation Act of 1920, 41 Stat. 477, 478 (1920) as amended, 49 U.S.C. § 1(18), (20) (1958)	10
7 U.S.C. 904	2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 437

COLORADO-UTE ELECTRIC ASSOCIATION, INC.,
a cooperative association, *Appellant*,

v.

THE WESTERN COLORADO POWER COMPANY, a Colorado Corporation, PUBLIC SERVICE COMPANY OF COLORADO, a Colorado Corporation, and THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, HENRY E. ZARLENGO, RALPH C. HORTON, and HOWARD S. BJELLAND, the individual members of said Commission, *Appellees*.

MOTION OF APPELLEES THE WESTERN COLORADO POWER COMPANY AND PUBLIC SERVICE COMPANY OF COLORADO TO DISMISS.

Appellees, pursuant to Rule 16(b) of the Rules of this Court, move that the appeal be dismissed on the ground that it does not present a substantial federal question.

Question Presented

The questions as stated by appellant are not involved in this case. The only question that could possibly be raised —and it would be frivolous—is whether the State of Colorado may, consistent with the federal Constitution, impose upon electrical cooperatives the same requirements respecting authorization of a new generating facility as it imposes upon other public utilities.

Statement

Appellant, in an evident attempt to introduce into this case a substantial federal question, has radically misstated the facts. Fortunately, the opinion of the Colorado Supreme Court describes the relevant facts in detail, so that we need do no more than summarize them.

Appellant, a rural electric cooperative association, has provided for several years electric power on a wholesale basis to its member cooperatives, which in turn have distributed that power to the ultimate users (J.S. 108-109). Appellant furnished this power from existing generating sources (*ibid*).

In the application that led to this litigation, appellant sought from the Colorado Public Utilities Commission authority to build a new steam generating plant near Hayden, Colorado.[1] Appellant's purpose was, not to supply the needs of its original members, for which its existing sources were adequate, but rather to supply power to eight new members whom it had never served before (J.S. 109). These new members in the past secured their power from facilities of the United States Bureau of Reclamation, from their own generating plants, from municipal generating plants, and from other utilities (J.S. 109-110). Under the proposed plan of appellant, those sources would be supplanted by the Hayden facility (*ibid*).

Appellant's application was filed pursuant to the state statutory provision that in general requires any "public utility" to obtain from the Commission a certificate of pub-

[1] Appellant also sought approval of a financing commitment it had secured from the REA to build the plant (J.S. 105). Since the governing federal statute, 7 U.S.C. 904, explicitly provides that "no loan for the construction, operation, or enlargement of any generating plant shall be made unless the consent of the State authority having jurisdiction in the premises is first obtained," no preemption contention has been, or could be, made.

lic convenience and necessity before constructing a facility to extend service into an area not theretofore served by the applicant and in which other utilities are providing service.[2] Utilities other than appellant were rendering service in the area which appellant proposed to serve, and appellant had not theretofore served that area (J.S. 107, 109, 110-111, 117, 149, 151). By an amendment enacted in 1961, prior to appellant's application of May 11, 1962, the Colorado legislature included in the definition of "public utility" every "cooperative electric association . . . whether supplying electric energy for the use of the public or for the use of its own members." 115-1-3(2), C.R.S. '63.[3] Thus

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[2] The statute, 115-5-1(1), C.R.S. '63, provides as follows:

"No public utility shall begin the construction of a new facility, plant, or system, or of any extension of its facility, plant, or system, without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction. Sections 115-5-1 to 115-5-4 shall not be construed to require any corporation to secure such certificate for an extension within any city and county or city or town within which it shall have theretofore lawfully commenced operations, or for an extension into territory, either within or without a city and county or city or town, contiguous to its facility, or line, plant, or system, and not theretofore served by a public utility, providing the same commodity or service, or for an extension within or to territory already served by it, necessary in the ordinary course of its business. If any public utility, in constructing or extending its line, plant, or system shall interfere or be about to interfere with the operation of the line, plant, or system of any other public utility already constructed, the commission, on complaint of the public utility claiming to be injuriously affected, after hearing, may make such order prohibiting such construction or extensions or prescribing such terms and conditions for the location of the lines, plants, or systems, affected as to it may seem just and reasonable."

[3] This provision reads as follows:

"Every cooperative electric association, or non-profit electric corporation or association, and every other supplier of electrical energy, whether supplying electric energy for the use of the public or for the use of its own members, is hereby declared to be affected with a public interest and to be a public utility and to be subject to the jurisdiction, control, and regulation of the commission and to the provisions of articles 1 to 7 of this chapter."

the statute on its face required Commission authorization for the proposed Hayden plant, as appellant conceded both by filing its application and also by explicit admission to the Commission (J.S. 152-153; see also J.S. 114).

Appellees, as public utilities long engaged in rendering service in the areas sought to be served by appellant, participated in the Commission proceeding and opposed the grant of a certificate to appellant.

By a 2-1 decision, the Commission awarded appellant the certificate. The Commission acknowledged that the needs of appellants' new members could continue to be met through existing sources (J.S. 67-68, 50-52, 110, 116-117), but the Commission interpreted the statute to permit the construction of substitute generating facilities even in these circumstances. The dissenting Commissioner agreed with the finding as to adequacy of existing sources but disagreed with the majority's reading of the statute (J.S. 94, 98).

In a brief opinion (J.S. 99-103), the State District Court affirmed the order of the Commission. The court also denied a stay, whereupon appellant commenced construction of the plant notwithstanding the pendency of the appeal to the Colorado Supreme Court. Appellant, however, assured both the Commission and the District Court that this course of action was perfectly riskless, since the Salt River Project Agricultural Improvement and Power District, an Arizona quasi-governmental unit that was one of appellant's new members, "had agreed to take the Hayden plant off the hands of Colorado-Ute at no loss to Ute in the event that 'some court' subsequently ruled that the certificate should not be issued" (J.S. 130, 106).

The Supreme Court, in a 6-1 decision, reversed the lower court and set aside the Commission's order. The Court explicitly accepted the Commission's findings of fact (J.S.

153-154, 110, 116-117), but it concluded that "no real effort was made [by the Commission] to decide this case in a manner consistent with the pertinent statute . . . and our many decisions construing and interpreting it" (J.S. 120).

More particularly, the Court rejected the Commission's view that the statute permitted the construction of a new generating plant to supplant pre-existing sources where those sources were adequate. Rather, the Court held that, under the Colorado statute, inadequacy of existing sources is a prerequisite to the construction of a new facility.

> "The State of Colorado has long been dedicated to the principle of 'regulated monopolies' in the conduct of public utility operations. This principle has been the public policy of this State since the year 1913 when the Public Utilities Act . . . was first adopted. The concept has never varied in a long line of decisions of this court.
>
> . . . . . .
>
> ". . . [T]he regulated monopoly principle is not consistent with the theory of the case upon which the two concurring Commissioners based their decision.
>
> . . . . . .
>
> ". . . This statute [115-5-1, C.R.S. '63] is the foundation of the regulated monopoly principle and as this court has observed on many occasions it was designed to prevent duplication of facilities and competition between utilities and to authorize new utilities in a field only when existing ones are found to be inadequate.
>
> . . . . . .

> "... Allowing customers to pick and choose from whom they will obtain any public utilities service obviously creates rather than prevents duplication, fosters rather than controls competition, and totally disregards the principle that inadequacy of existing facilities must be shown in order to authorize a new service" (J.S. 112-116).

Since, as the Court pointed out (J.S. 116-117), all members of the Commission had agreed that existing sources of power were adequate, it followed that the Commission had erred as a matter of law in awarding the certificate.

This should by all rights have been the end of the case, since the only issue throughout the proceedings had been whether the appellant was, as a matter of state public utilities law, entitled to a certificate. Appellant had never urged either that denial of the certificate would raise issues under the state or the federal Constitution, or that state law or the federal Constitution exempted appellant from the requirement that a certificate be obtained (J.S. 10, 122, 152).

The Supreme Court, however, asked for additional oral argument upon the question of the constitutionality of the 1961 statutory amendment by which cooperatives were required to comply with the Public Utilities Law (J.S. 10, 122).

In upholding the validity of the statute under the federal Constitution, the Court emphasized that prior to oral argument appellant "had not questioned the constitutionality of the Act, had filed its application before the Commission and followed the matter through Commission, district court, and briefs in this court without suggesting unconstitutionality" (J.S. 122). The Court also described the widely recognized interest of the consuming public in the activities of wholesale suppliers of electric power, as to which "[t]he form of organization delivering service makes no difference

whatever . . ." (J.S. 122-126). The Court concluded: "[Appellant] furnishes electric energy which is used by countless consumers in a very large segment of this State. The widespread interest of the public is clearly shown, and this Court should not declare the legislative act to be void, especially when the parties themselves admit that it is valid and enforceable" (J.S. 124).

On petition for rehearing, appellant raised the issues that it now presses upon this Court in its Jurisdictional Statement. The Supreme Court disposed of the contentions in such fashion as to leave no room for argument respecting their insubstantiality.

First, the Court flatly denied that its decision discriminated against appellant in any respect whatever. The Court had not "denie[d] Colorado-Ute the authority to serve its members and give[n] protestants the exclusive right to do so." Rather, the Court had simply applied to appellant the principle governing all other utilities, namely, that appellant "may not expand its facilities and spread its service areas to a point where it would encompass those already being adequately served by other certificated suppliers of electrical energy" (J.S. 149-150). Nor was it material that one major existing source was a non-regulated supplier, the Bureau of Reclamation, for "[t]he requirement of the Public Utilities Law is to protect the public from supporting increased investment (in this case in excess of thirty million dollars) without regard to whether that investment would duplicate the facilities of a regulated or a non-regulated supplier. The adverse economic impact upon the public is the same . . ." (J.S. 150). Moreover, appellant was not being denied the right afforded other utilities to construct new facilities to serve existing customers, because the " 'existing members' referred to in the petition for rehearing are the *proposed new members*

for whom it would be necessary that Colorado-Ute expand its service area to a large portion of the State of Colorado, and have additional electrical energy at its disposal. Colorado-Ute has not been denied the right to serve its original members. Its desire to construct *new facilities* and to serve *new members* was the very issue requiring proof of public convenience and necessity which it failed to sustain because of the Commission's conclusion that existing sources of energy were adequate" (J.S. 151).

Second, the Court dismissed appellant's argument that it could not constitutionally be regulated as a public utility. The Court referred to its previous discussion of the public stake in appellant's activities and also described how appellant had disclaimed any such contention earlier in the proceedings. "... Colorado-Ute completely reverses the position it unequivocally took before the Commission and throughout the entire proceeding, and apparently places reliance at this late date upon the content of the views of one dissenting Justice" (J.S. 152).

Finally, the Court agreed that, had it substituted its findings of fact for those of the Commission, "those adversely affected would have ground for complaint"; but it pointed out once again that the finding of fact assertedly made by the Court—that existing power sources were adequate—"was made by the Commission and is abundantly supported by the evidence" (J.S. 153-154).

These, then, are the facts against which the contentions made in the Jurisdictional Statement must be measured.

Argument

No substantial federal question is involved in this case. As we have indicated in the preceding statement, the Supreme Court of Colorado simply applied to appellant the principles of public utilities law that govern all regulated

producers of electric power in the State of Colorado. The contentions advanced in appellant's Jurisdictional Statement rest in large measure upon a misconstruction of the Colorado Supreme Court's decision, as that Court explicitly pointed out in dealing with those same contentions on appellant's petition for rehearing.

1. Appellant's first argument is that the State statute, as applied by the Colorado Supreme Court, is constitutionally infirm because it denies appellant "the same rights and opportunities as existing utilities." The first aspect of this contention is that the statute "denies Colorado-Ute the right to furnish power and energy to its members, and gives the Power Companies [appellees] the exclusive right and monopoly to furnish such service" (J.S. 15).

As to those areas in which appellees are now rendering service, it is certainly true that appellees will in the future be free to sell power to appellant's new members, as they did to a number of those members prior to the provision of power by the Bureau of Reclamation (J.S. 109-110).[4] It is also true that the members may well return to purchasing power from the Bureau.

But these considerations are quite immaterial to the constitutional issue, which is simply whether the "regulated monopoly" principle of the Colorado statute is wholly arbitrary or invidiously discriminatory. Plainly, it is neither. First, the generation and sale of electric power is an enterprise of such vital consequence to the public that

[4] Contrary to the assertion of appellant (J.S. 16)—which is unsupported by any record reference—appellees have adequate generating facilities to supply, in their respective service areas, all of appellant's new members, as the record clearly establishes (J.S. 110, 111, 117, 50, 67). While the opinion of the Colorado Supreme Court does not indicate how the state law would apply to a hypothetical situation in which appellees would seek to construct such facilities, surely it is clear that the requirements of that law would fall equally upon all utilities; and that, as we indicate above, is the constitutionally relevant point.

it is pre-eminently subject to state regulation.[5] Second, the provisions of the state law, as the Colorado Supreme Court stressed, apply equally to all public utilities. Thus, appellant as well as appellees has an advantage in established service areas; and appellees as well as appellant must, as a prerequisite to the construction of facilities to serve new customers in an area in which they have never provided service, demonstrate that existing sources of power are inadequate. And, finally, state regulation of public utilities grounded upon the conviction that the public will be best served by the elimination of duplication in generating and transmission facilities and by the full utilization of existing sources of power—the same conviction that underlies state regulation of many types of activities affecting the public—certainly cannot be termed arbitrary in light of this Court's many decisions affirming the broad scope of state police power. See, *e.g.*, *Ferguson* v. *Skrupa*, 372 U.S. 726; *Williamson* v. *Lee Optical Co.*, 348 U.S. 483; *Olsen* v. *Nebraska*, 313 U.S. 236; *Nebbia* v. *New York*, 291 U.S. 502.[6] See also *Cities Service Co.* v. *Peerless Co.*, 340

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[5] See, *e.g.*, *Union Dry Goods Co.* v. *Georgia P.S. Corp.*, 248 U.S. 372; *Southern Iowa Electric Company* v. *Chariton*, 255 U.S. 539; *Laclede Gas Light Co.* v. *Murphy*, 170 U.S. 78; *New York* v. *Squire*, 145 U.S. 175; *United States* v *Oklahoma Gas & Electric Co*, 297 Fed. 575 (8th Cir. 1924).

[6] For examples of the application of the "regulated monopoly" principle in state regulation of business, see, *e.g.*, *General Alarm* v. *Underdown*, 76 Ariz. 235, 262 P. 2d 671, 672-73 (1953); *McFayden* v. *Pub. Util. Consol. Corp.*, 50 Idaho 651, 299 Pac. 671 (1931); *People ex rel. Hafer* v. *Flynn*, 14 Ill. App. 2d 301, 144 N.E. 2d 747, 756 (1957); *Missouri Pac. Ry. Co.* v. *State Corp. Comm.*, 192 Kan. 575, 389 P. 2d 813 (1964); *Eck Miller Transfer Co.* v. *Armes*, 269 S.W. 2d 287, 289 (1954); *State ex rel. Util. Comm.* v. *Carolina Coach Co.*, 260 N.C. 43, 132 S.E. 2d 249 (1963); *Yellow Transit Co.* v. *State*, 198 Okla. 229, 178 P. 2d 83 (1947); *Yellow Cab Co. of Pittsburgh* v. *Pennsylvania Pub. Util. Comm.*, 161 Pa. Super. 41, 54 A. 2d 301 (1947); *Virginia Stage Lines* v. *Commonwealth*, 185 Va. 390, 38 S.E. 2d 576 (1946). Federal regulatory activities focusing on the standard of public convenience and necessity similarly stress the factor of adequacy of existing service. See, *e.g.*, Railroads—Transportation Act of 1920, 41

U.S. 179, 185-186, where this Court upheld the constitutionality of state regulation of natural gas prices on the ground that the aim of the regulation was to prevent economic and physical waste.

2. The second instance of "discriminatory treatment" cited by appellant (J.S. 17-18) is that in this case, but not in others, the Colorado Supreme Court rejected a Commission finding of fact, *i.e.*, the "finding" that the public convenience and necessity would be served by granting appellant's application. Of course, even were appellants' assertions correct, the most that would be disclosed would be an error by the state court, not the sort of "invidious discrimination" that amounts to a violation of the Constitution. See, *e.g.*, *Williamson* v. *Lee Optical Co.*, *supra*, at 489. This Court has "said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions . . . [or] immunity from judicial error. . . .' *Milwaukee Electric Ry. & Light Co.* v. *Wisconsin ex rel. Milwaukee*, 252 U.S. 100, 106 (1920). Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." *Beck* v. *Washington*, 369 U.S. 541, 554-555. In addition, appellant's assertions are quite incorrect. As the Colorado Supreme Court repeatedly pointed out (see *supra*, pp. 4-5, 8), it accepted the Commission's findings of fact—in particular the finding

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Stat. 477, 478 (1920) as amended, 49 U.S.C. § 1(18), (20) (1958) as interpreted in *Chesapeake & Ohio Ry.* v. *United States*, 283 U.S. 35, 41-42 (1931); Motor Carriers—Motor Carrier Act of 1935, 49 Stat. 543 (1935) as amended 49 U.S.C. §§ 307(a), 309(b) as interpreted in *I.C.C.* v. *Parker*, 326 U.S. 60, 65-69 (1945); *I.C.C.* v. *J-T Transport Co.*, 368 U.S. 81, 88 (1961); *Curtis, Inc.* v. *United States*, 225 F. Supp. 894, 898 (D. Colo.), *aff'd*, 378 U.S. 128 (1964); Telegraph and Radio—Communications Act of 1934, 48 Stat. 1075, 1083 (1934), as amended, 47 U.S.C. §§ 214(a), 307(a) as interpreted in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 215-17 (1943); *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137-38 (1940); *Western Union Div. Commercial Telegraphers* v. *United States*, 87 F. Supp. 324, 335-36 (D.D.C.) *aff'd*, 338 U.S. 864 (1949).

that existing sources of power supply were adequate—and reversed the Commission solely because as a matter of law the statute in such circumstances precluded the authorization of a new facility. The "public convenience and necessity" standard is an ultimate conclusion that must be based upon the proper statutory criteria and upon adequate factual findings. See *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 64. Accordingly, the Colorado Supreme Court has repeatedly struck down orders where the Commission's conclusion respecting public convenience and necessity was not adequately supported. See, *e.g.*, *Public Utilities Commission* v. *Verl Harvey, Inc.*, 150 Colo. 159, 371 P.2d 452 (1962); *Public Utilities Commission* v. *Donahue*, 138 Colo. 492, 335 P.2d 285 (1959). Appellant's contention of discrimination is genuinely frivolous.

3. Appellant seems to suggest that somehow it has been unfairly treated by the Supreme Court's adverse decision after completion of the Hayden plant. But of course it assumed whatever risks there might be by proceeding with the construction. Moreover, evidently there was no risk, for appellant, as we have indicated, assured the Commission and Court that the Salt River Project, an Arizona entity, had agreed to save appellant harmless from the consequences of an adverse judicial decision.

4. Next, appellant contends that its constitutional rights have been violated by the Supreme Court's determination that it is a "public utility" within the meaning of the statute. This ruling, according to appellant, means that, although appellant does not hold itself out to serve the general public but rather only its members, it has now been saddled with the obligation to serve the public. This, says appellant, is constitutionally invalid." (J.S. 20).

We note that this is a rather curious argument for appellant to make, since, as the Colorado Supreme Court observed, "The record shows that

Whatever may be the permissible range of State regulatory authority in this respect—and we have little doubt that, despite the now discredited "freedom of contract" decisions relied upon by appellant, the authority would extend to requiring so vital an enterprise as a power producer to serve all members of the general public on equal terms—the issue raised by appellant most assuredly is not involved here.[8] All that the Colorado Supreme Court held, and all that its opinion can reasonably be read to mean even

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Colorado-Ute in wholesaling electric power intends to serve various classes of customers including consuming cooperatives, other wholesaling cooperatives, governmental or quasi-governmental bodies (Salt River), and even an arm of the Federal Government, the Bureau of Reclamation, together with any other applicants for service if approved by the Commission" (J.S. 123).

[8] The current vitality of the authorities cited by appellant may be gauged by the opinion of Judge Frank in *Fordham Bus Corporation* v. *United States*, 41 F. Supp. 712, 715 (S.D. N.Y. 1941):

> "A private carrier cannot, says the plaintiff [and the appellant here—J.S. 21], be converted, by legislative fiat, into a common carrier and thereby be subjected to regulations which are valid solely with respect thereto. In support of its contention, plaintiff [and appellant here—J.S. 21] cites such cases as Michigan Public Utilities Commission v. Duke, 266 U.S. 570, . . . and Frost Trucking Co. v. Railroad Commission, 271 U.S. 583 . . .; cf. Smith v. Cahoon, 283 U.S. 553. But the basic postulate of those decisions was destroyed by the later decision in Nebbia v. New York, 291 U.S. 502, 536, 537 . . . which held that 'there is no closed class or category of . . . businesses affected with a public interest.' The court there said: 'And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise.' See also Olsen v. Nebraska, 313 U.S. 236. . . . It is significant that the earlier cases cited by plaintiff were also cited in the dissenting opinion in the Nebbia case to show that the majority opinion was inconsistent with the prior precedents. See 291 U.S. at 555 . . ."

For another excellent description of how the decisions relied upon by appellant have been undermined, see *Boylan* v. *United States*, 310 F. 2d 493 (9th Cir. 1962), where the court rejected the contention that one whose business has never been "public in character" cannot constitutionally be required to secure a certificate of public convenience and necessity, such

in *dictum*, is that appellant is a "public utility" within the meaning of § 115-5-1(1) and therefore could not construct the Hayden plant without a certificate. If in subsequent litigation the question of the obligation of appellant to serve non-members were raised, presumably appellant would defend on the ground that no provision of the state statute specifically imposes such an obligation upon it, and further that section 115-1-3(2), in defining "public utility" as every cooperative or other supplier of electric energy "for the use of the public or for the use of its own members," indicates that cooperatives may restrict their service to members. Certainly such a contention would be available to appellant.

5. Appellant's final contention is as thoroughly insubstantial as those we have already discussed. Appellant entered into contracts with its new members to supply power from the Hayden plant; and so it now maintains that the Colorado Supreme Court decision, by disabling it from performing those contracts—all of which were made after enactment of the 1961 statutory amendment subjecting cooperatives to regulation (Tr. 80-83, Tr. Ex. 5, 6, 7, 30)—impairs the obligation of contract within the meaning of Article I, Section 10(1) of the Constitution. It is hard to believe that this contention is seriously advanced. Surely appellant must be aware of the line of decisions reaching from *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, to *El Paso* v. *Simmons*, 379 U.S. 497, establishing that contracts are made subject to the requirements of state law. Indeed, appellant need have looked no further than the very case upon which it relies for its contract clause claim, *Northern Pacific Railway* v. *Duluth*, 208 U.S. 583 (J.S. 3, 21). There the Northern Pacific contended that municipal legislation requiring it to repair a viaduct was an unconstitutional impairment of its prior contract with the City,

under which the City agreed to make such repairs at its own expense. In rejecting that contention, the Court held as follows:

> "There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power and not in violation of the constitutional inhibition against the impairment of the obligation of contracts." *Id.*, at 596.

Conclusion

For the reasons set forth above, the appeal should be dismissed for want of a substantial federal question.

Respectfully submitted,

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BRIEF

Of Appellant Colorado-Ute Electric Association, Inc., In Opposition To Motion of Appellees the Western Colorado Power Company and Public Service Company of Colorado to Dismiss.

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INDEX

	Page
Introductory Paragraph	1
Questions Presented	2
Statement	3
Argument	7
Conclusion	12

TABLE OF CITATIONS

CASES:

California State A. Ass'n., Inter-Ins. Bureau v. Maloney, 341 U.S. 105, 71 S. Ct. 601, 95 L. Ed. 788 (1951)	9
El Paso v. Simmons, 379 U.S. 497, 85 S. Ct. 577, 13 L. Ed. 2d 446 (1965)	10
Fordham Bus Corporation v. United States, 41 F. Supp. 712 (S.D. N.Y. 1941)	9
Frost v. Railroad Commission of California, 271 U.S. 583, 46 S. Ct. 605, 70 L. Ed. 1101 (1926)	9
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S. Ct. 624, 95 L. Ed. 817 (1950)	10
Michigan Public Utilities Commission v. Duke, 266 U.S. 570, 45 S. Ct. 191, 69 L. Ed. 445 (1925)	9
Producers Transportation Co. v. Railroad Commission, 251 U.S. 228, 40 S. Ct. 131, 64 L. Ed. 239 (1920)	9
Public Utilities Commission v. Colorado Interstate Gas Company, 142 Colo. 361, 351 P. 2d 241 (1960)	6
Smith v. Cahoon, 283 U.S. 553, 51 S. Ct. 582, 75 L. Ed. 1264 (1931)	9
Stephenson v. Binford, 287 U.S. 251, 53 S. Ct. 181, 77 L. Ed. 288 (1932)	9

UNITED STATES CONSTITUTION:

5th Amendment	7, 8
14th Amendment	7, 8
Article 1, Section 10(1)	8, 9

Page

COLORADO STATUTES:

1963 C.R.S. 115-5-1 5

STATE ATTORNEY GENERAL'S OPINION:

No. 61-3536 11

OTHER:

43 Am. Jur., Public Utilities and Services, Sec. 22, p. 586 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 437

COLORADO-UTE ELECTRIC ASSOCIATION, INC., a cooperative association, *Appellant*,

v.

THE WESTERN COLORADO POWER COMPANY, a Colorado Corporation, PUBLIC SERVICE COMPANY OF COLORADO, a Colorado Corporation, and THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, HENRY E. ZARLENGO, RALPH C. HORTON, and HOWARD S. BJELLAND, the individual members of said Commission, *Appellees*.

BRIEF

Of Appellant Colorado-Ute Electric Association, Inc., In Opposition To Motion of Appellees the Western Colorado Power Company and Public Service Company of Colorado to Dismiss.

Introductory Paragraph

Appellant Colorado-Ute Electric Association, Inc. will be referred to herein as Colorado-Ute; Appellees Western Colorado Power Company and Public Service Company of Colorado will be collectively referred to

herein as the Power Companies, or individually as Western or Public Service Company; and Appellee The Public Utilities Commission of the State of Colorado will be referred to herein as the Commission. References to the Jurisdictional Statement will be made as (J.S., p.); references to the Motion to Dismiss filed by Appellees will be made as (Motion, p.); and references to the Commission's Record will be made as (C.R., p.).

Appellant Colorado-Ute, pursuant to Rule 16(3) of the Rules of this Court, respectfully submits this Brief in opposition to the Motion to Dismiss heretofore filed by the Power Companies and asserts that said Motion should be denied since the appeal does present substantial federal constitutional questions, as is shown in the Jurisdictional Statement. We rely upon said Statement, since it deals with such issues in detail, to establish the substantial questions involved, rather than this Brief, which passes only upon some of the more glaring erroneous assertions made by the Power Companies in their Motion to Dismiss.

Questions Presented

The Power Companies assert (Motion, p. 1) that the questions stated in our Jurisdictional Statement are not involved in this case. We submit that the Jurisdictional Statement contains an adequate answer to this assertion. The Power Companies further assert (Motion, p. 1) that the only question that could possibly be raised is whether the State of Colorado may, consistent with the federal Constitution, impose upon electrical cooperatives the same requirements as it imposes upon other public utilities. While the Power Companies would like to phrase the questions involved

in such a way as to make the answers apparent, the question posed by them is obviously not the question involved. On the contrary, the first question posed in the Jurisdictional Statement is whether State law can make Colorado-Ute a public utility but deny to it the same rights and opportunities held by other public utilities, without violating rights of Colorado-Ute guaranteed by the United States Constitution. Furthermore, the question posed by the Power Companies wholly disregards the second question posed in the Jurisdictional Statement, namely, whether State law can make a public utility out of Colorado-Ute, which possesses none of the attributes of a public utility, without violating rights of Colorado-Ute guaranteed by the United States Constitution. Indeed, it appears to us that the Power Companies do not really contend that the Colorado law involved here *is* constitutional, but are content to rely merely on the assertion that there is not a substantial federal question involved. As shown above, there are not only federal questions involved, but serious federal constitutional questions involved. Such being the case, the appeal should not be dismissed.

Statement

In their opening remarks the Power Companies assert (Motion, p. 2) that Colorado-Ute has radically misstated the facts. They fail, however, to show a single fact misstated by Colorado-Ute, relying instead on their assertion of only those facts which they deem important.

The Power Companies also attempt to cast doubt on the need for the Hayden Plant (Motion, pp. 2 et seq.), and this despite the express findings of the Com-

mission that Colorado-Ute is "faced with the immediate problem of securing new and additional sources of power and energy" (J.S., p. 50), that such "problem . . . is not substantially questioned in the record" (J.S., p. 50), and that "the entire record basically supports the finding that Ute needs more power" (J.S., p. 67).

The Power Companies also assert (Motion, p. 3) that utilities other than Colorado-Ute were rendering service in the area which Colorado-Ute proposed to serve. The Commission in its decision adequately answered this assertion as follows:

> "If power from the Hayden Plant were to be used to invade the certified area of private utilities, the position of Protestants (the Power Companies) that they would be detrimentally affected would be sound. This, however, is not the case. *Power from the Hayden Plant will be used to serve consumers who are not now customers of private utilities.*" (Emphasis added, J.S., p. 66).

The above statement by the Commission clearly indicates that no public utility (and particularly neither of the Power Companies) is presently serving the so-called "new members" of Colorado-Ute. It also clearly indicates a distinction which the Power Companies fail to make, namely, that Colorado-Ute did *not* seek, and did *not* receive, any authority from the Commission whatever to serve any *area*. It sought the right to serve its members *only* (J.S., p. 28), and the Commission carefully restricted Colorado-Ute to serving its members *only* (J.S., p. 59). All of the Colorado members of Colorado-Ute are themselves public utilities subject to regulation by the Commission, and the

public is served through these members, and not through Colorado-Ute.

The strange position of the Power Companies in this matter was pointed out in the Judgment of the Montrose District Court, wherein Judge Kempf pointed out that the Power Companies:

> "... are aptly described as 'investigators and informants' for the Commission. Neither of them is selling power to any of the members and consumers of the fourteen distribution cooperatives ...". (J.S., p. 100).

In view of the foregoing it is surprising that the Power Companies would point out (Motion, p. 5) that the statute (1963 C.R.S. 115-5-1), in the words of the Colorado Supreme Court, "was designed to prevent duplication of facilities and competition *between utilities*". This is particularly surprising in view of the fact that the members of Colorado-Ute were being served only by Colorado-Ute and the Bureau (the latter not being considered a public utility even by the Colorado Supreme Court, J.S., p. 151), and were not being served by either of the Power Companies. Further, the Bureau *supported* the application of Colorado-Ute, thereby indicating that it did not consider the construction of the Hayden Plant as duplicative of Bureau facilities or a competitive threat to it.

The Power Companies also point (Motion, p. 6) to the language of the Colorado Supreme Court that customers cannot be allowed "to pick and choose from whom they will obtain any *public utilities* service." (Emphasis added). Again, the absurdity of the statement is apparent since none of the members of Colorado-Ute was receiving such service, or proposed to

receive such service, from anyone other than Colorado-Ute.

The Power Companies also point (Motion, p. 6) to the language of the Colorado Supreme Court (Motion, p. 6) to the effect that insofar as jurisdiction is concerned, "the form of organization delivering service makes no difference whatever . . .". (J.S., pp. 122-126). That such statement is not true is shown by the decision of the Colorado Supreme Court in *Public Utilities Commission* v. *Colorado Interstate Gas Company,* 142 Colo. 361, 351 P. 2d 241 (1960), wherein the Court held that a *privately-owned* wholesaler was *not* subject to the jurisdiction of the Commission, since it was *not* a public utility. It was not a public utility, said the Court, because it was not "indiscriminately serving the public." And, said the Court, to constitute public utility service, "the service must be such that all members of the public have an *enforceable right* to demand it." (Emphasis added). Under these tests it is apparent that the form of the organization indeed does make a great difference.

The Power Companies would have this Court believe (Motion, p. 7) that the same principles have been applied to Colorado-Ute as to other utilities. As shown above, such is not the case. Furthermore, the Commission expressly recognized that "investor owned utilities would be permitted to construct comparable plants *without Commission approval . . .*". (Emphasis added, J.S., p. 56). The correctness of the Commission's statement in this regard is documented by the fact that Public Service Company was at the time of the hearing and still is constructing substantial additional generating facilities in Colorado for which no Com-

mission approval was ever sought, required, or obtained, and for which no proof of public convenience and necessity was ever made. For the Power Companies to now suggest (Motion, p. 9) that the requirements of the law "fall equally upon all utilities" is belied by the conduct of Public Service Company in this regard.

Argument

As indicated in the Jurisdictional Statement, substantial federal constitutional questions are involved in this case. The Power Companies in their Motion to Dismiss divide the two questions originally presented into five particular items, but we will follow the format of the Jurisdictional Statement.

Our first contention was that Colorado-Ute is denied due process and equal protection under the 5th and 14th Amendments to the United States Constitution, by virtue of the Colorado statute which makes Colorado-Ute a public utility but denies to it the same rights and opportunities as existing utilities.

The Power Companies, refusing to meet the question presented, merely contend that the only constitutional issue presented is whether the doctrine of "regulated monopoly" is wholly arbitrary or invidiously discriminatory. (Motion, p. 9).

We have never contended that the doctrine of "regulated monopoly" is arbitrary or discriminatory. But we have contended and do contend that a statute which gives certain *existing* power suppliers preferences over other *existing* power suppliers is arbitrary and discriminatory. As we pointed out before, the

members of Colorado-Ute, under the law of Colorado, cannot be required to receive service from the Bureau of Reclamation (J.S., p. 16); but, said the Colorado Supreme Court, if they choose not to receive service from the Bureau of Reclamation, and instead choose to look to a public utility for service, they cannot go to Colorado-Ute for such service, even though Colorado-Ute has been declared to be a public utility. Instead, they must buy their power from the Power Companies, even though these companies would have to construct new facilities to serve them.[1]

The second question posed in our Jurisdictional Statement is whether Colorado law deprives Colorado-Ute of its constitutional rights under Article 1, Section 10(1) of the United States Constitution, and under the 5th and 14th Amendments, by converting it into a public utility required to serve the public, even though it has none of the attributes of a public utility.

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[1] In our Jurisdictional Statement we made the statement that the Power Companies would have to construct new facilities to meet the needs of Colorado-Ute's members. In their Motion to Dismiss, the Power Companies point to the fact that our assertion in this regard was unsupported by any record reference, and asserted that they have adequate *generating facilities to supply* all of the needs of Colorado-Ute's new members (Motion, p. 9). To dispel any further question in this regard, we merely point to the testimony of Mr. Patterson, vice-president of Public Service Company, to the effect that if his company was called upon to meet the needs that are to be served out of the Hayden Plant, it would have to step out and build the same kind of facility itself, since recent new plants (for which no certification had been obtained) were constructed not to meet these needs but to meet Public Service Company's own load growth. (C.R., p. 1915). Insofar as Western is concerned, its engineer, Mr. Bryner, testified that Western did not have the physical capacity in its system to serve the cooperatives it had served in the past. (C.R., p. 1685).

The gist of the response made by the Power Companies (Motion, p. 13) is that the many decisions of this Court declaring that the State cannot by mere legislative fiat convert one who has not dedicated his property to public use into a public utility,[2] have been undermined. The Power Companies cite in support of their contention the remarks of Judge Frank in *Fordham Bus Corporation* v. *United States,* 41 F. Supp. 712 (S.D., N.Y. 1941). While Judge Frank certainly questioned the vitality of these cases, nonetheless it is noted that Justice Douglas in *California State A. Ass'n. Inter-Ins. Bureau* v. *Maloney,* 341 U.S. 105, 71 S. Ct. 601, 95 L. Ed. 788 (1951), some ten years *after* the Fordham Bus decision, expressly pointed out that the Duke and Frost cases hold exactly as we stated earlier, to wit, "that private carriers . . . could not consistently with Due Process be converted into public carriers by legislative fiat . . .". Accordingly, we submit that while the Power Companies consider such cases to be "discredited", this Court apparently does not.

In connection with Article I, Section 10(1) of the United States Constitution, the Power Companies refer the Court (Motion, p. 14) to its decision in *El*

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[2] *Producers Transportation Co.* v. *Railroad Commission,* 251 U.S. 228, 40 S. Ct. 131, 64 L. Ed. 239 (1920);

Michigan Public Utilities Commission v. *Duke,* 266 U.S. 570, 45 S. Ct. 191, 69 L. Ed. 445 (1925);

Frost Trucking Co. v. *Railroad Commission,* 271 U.S. 583, 46 S. Ct. 605, 70 L. Ed. 1101 (1926);

Smith v. *Cahoon,* 283 U.S. 553, 51 S. Ct. 582, 75 L. Ed. 1264 (1931);

Stephenson v. *Binford,* 287 U.S. 251, 53 S. Ct. 181, 77 L. Ed. 288 (1932).

Paso v. *Simmons,* 379 U.S. 497, 85 S. Ct. 577, 13 L. Ed. 2d 446 (1965), but they do not point out that the Court there stated that a state cannot adopt a policy which permits "the destruction of contracts." As pointed out in our Jurisdictional Statement, the dissenting opinion of Justice Frantz of the Colorado Supreme Court recognized that the majority opinion of the Court "has effectively incapacitated it (Colorado-Ute) as the supplier of energy for its members." In other words, not only have the contractual rights of Colorado-Ute been destroyed, but virtually its entire business has been taken from it.

The Power Companies also make light (Motion, p. 11) of our contention that the Colorado Supreme Court violated the constitutional rights of Colorado-Ute by rejecting the Commission's express finding that public convenience and necessity required the construction of the Hayden Plant, and making its own finding to the contrary. This Court, however did not consider such a contention so lightly in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 71 S. Ct. 624, 95 L. Ed. 817 (1950), wherein it condemned arbitrary findings as being offensive to due process of law. In the instant case there was ample evidence to support the Commission's finding that public convenience and necessity required construction of the Hayden Plant, and no such evidence to support the Colorado Supreme Court's finding to the contrary.

Finally, the Power Companies assert that the question of whether Colorado-Ute is required to serve other than its members is not an issue in this case (Motion, p. 14). We disagree. Under settled public utility law,

any organization which is a public utility *must* serve all who apply for service, 43 Am. Jur., *Public Utilities and Services,* Sec. 22, p. 586. Indeed, the Attorney General of the State of Colorado has expressly held that an electric cooperative, having been declared to be a public utility, must serve all who apply for service. *Attorney General's Opinion No. 61-3536* (1961). The same opinion also holds that service to members only (such as Colorado-Ute renders and is limited to rendering) is inconsistent with the concept of a public utility. Thus, we submit Colorado-Ute may be required to serve other than its members, a burden which had not heretofore been imposed upon it.

In closing, and as we asserted by way of summary in our Jurisdictional Statement, it is submitted that the State of Colorado has, in the instant matter, first made a public utility out of a business which has not dedicated its property to public use. Having then declared such business to be a public utility, it relegates it to a second-class status inferior to all other public utilities in the state by depriving it of rights recognized and confirmed in such other public utilities. In taking such action, the State of Colorado has deprived Colorado-Ute of equal protection of the laws, due process of law, and freedom of contract.

Conclusion

The questions involving these violations of the constitutional rights of Colorado-Ute are substantial and of public importance, and the Court should hear argument concerning them.

Respectfully submitted,

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PETITION FOR REHEARING OF APPELLANT COLORADO-UTE ELECTRIC ASSOCIATION, INC.

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PETITION FOR REHEARING OF APPELLANT COLORADO-UTE ELECTRIC ASSOCIATION, INC.

In accordance with Rule 58 of the Rules of the United States Supreme Court, it is respectfully prayed that this Honorable Court grant Appellant Colorado-Ute Electric Association, Inc., hereinafter referred to as Colorado-Ute, a rehearing of this Court's per curiam decision of October 24, 1966, in the above-entitled matter dismissing the appeal of Colorado-Ute for want of

jurisdiction. The reasons for this Petition are as follows:

1. The statutes of the State of Colorado, and principally 1963 CRS 115-5-1, deny Appellant fair and equal treatment under the law. A large number of people in Colorado banded together in an effort to construct their own electric generating facilities, such people being in an area not certificated to any public utility. The statutes of the State of Colorado, however, as interpreted and applied by the Colorado Supreme Court, preclude these people from constructing facilities to meet their own needs only, and instead require them to purchase either from non-public utility sources (from which they have no right to demand service) or from investor-owned power companies which have not theretofore served the area and which do not have facilities in the area to meet the needs of the people. Such, we submit, makes these people captives of the power companies, and cuts at the very core of a free and independent people.

2. The statutes of the State of Colorado, and principally 1963 CRS 115-5-1, violate the constitutional rights of Colorado-Ute by making it a public utility, thereby requiring it to serve all who may seek service, whether member or non-member, and thereby destroying its right to serve its members only, as allowed to it in its Charter from the State of Colorado and its certificate from the Public Utilities Commission of the State of Colorado. If Colorado-Ute must serve all who may apply, and such may be the effect of such statutes, then Colorado-Ute must not only violate the express provisions of its Charter from the State, but it must also violate the certificate granted to it

by the Public Utilities Commission, thereby incurring the criminal sanctions and penalties provided by Colorado law. Such, we submit, violates the constitutional rights of Colorado-Ute.

3. The decision of the Colorado Supreme Court is inconsistent with the decision of the U. S. Court of Appeals for the Fifth Circuit in *Rural Electrification Administration et al.* v. *Central Louisiana Electric Company, Inc., et al.*; 354 F. 2d 859 (January 13, 1966), wherein the Court held that certain investor-owned companies there involved do not have the right to be free of competition to the exclusion of all others. This Court, in *Central Louisiana Electric Company, Inc., et al.* v. *Rural Electrification Administration et al.*, — U.S. —, 87 S. Ct. 34, — L. Ed. 2d — (October 10, 1966), denied certiorari, thereby finalizing such decision.

4. The decision of the Colorado Supreme Court is inconsistent with the decision of the Mississippi Supreme Court in *Mississippi Power Co. et al.* v. *South Mississippi Electric Power Association, et al.*, — Miss. —, 183 So. 2d 163 (February 14, 1966), wherein the Court upheld the right of a cooperatively-owned organization to resist being made a "captive" of the power companies there involved. This Court, in *Mississippi Power Company et al.* v. *South Mississippi Electric Power Association, et al.*, — U.S. —, 87 S. Ct. 51, — L. Ed. 2d (October 10, 1966), denied certiorari, thereby finalizing such decision.

5. The decision of the Colorado Supreme Court is inconsistent with the decision of the Maine Supreme Court in *Dickenson et al.* v. *Maine Public Service Co.*, — Maine —, — A. 2d — (Docket No. 278, Law Docket

No. 607, October 21, 1966), wherein the Court held (1) that "the scales may not be weighted so as to give one competitor an unfair advantage over the other", (2) that a statute which gives one competitor a decided advantage over the other is unconstitutional, and (3) that with reference to the contention (as in the instant matter) that a private company cannot be made into a public one by legislative fiat, such cannot be done, since a "horse cannot be converted to a camel by the enactment of a statute." Such decision may well be appealed to this Court.

For the above reasons it is respectfully suggested that this Court should note probable jurisdiction of the within matter, review the foregoing decisions and the record here involved, and following such review, reverse the decision of the Colorado Supreme Court. The questions presented in this proceeding involve serious violations of constitutional rights, such questions are substantial and of great public importance, and the Court should grant rehearing and hear argument concerning them.

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Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of this Court

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